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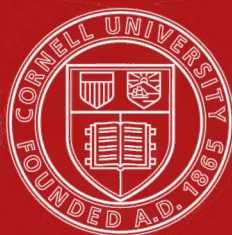
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THE LAW
OF
LEASES IN SCOTLAND.

The Law of Leases in Scotland

A TREATISE
ON
THE LAW OF LEASES
IN SCOTLAND

BY
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ADVOCATE

AUTHOR OF 'THE LAW OF LAND-OWNERSHIP IN SCOTLAND'

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PREFACE.

IN pursuance of a long-cherished project to attempt an exposition in full of the existing law relating to the possession of land in Scotland, I had already collected the materials for an independent work on Leases, when the publishers of Hunter on 'Landlord and Tenant' asked me to prepare a new edition of that well-known work. The result of much study thereof and of repeated consultation with practitioners, whose opinion seemed to me decisive, was to convince me that a reproduction of its voluminous pages, brought down to date, would be a misfortune rather than a boon to the profession. Its value as a storehouse of authorities cannot be gainsaid and will never be superseded. But it is pedantic, operose, and ill-arranged. Too often its plan consists in setting down a string of rubrics in order of date, without regard to logical sequence, and without any attempt to seek out the principle or rule, which alone makes a decision worth quoting; and its historical disquisitions needlessly encumber a treatise which was doubtless intended mainly for use in practice. The publishers were pleased to concur in the view that a concise treatment of the subject, which should seek to amend these faults of method, and which should be based—as all works on the Scottish Law of Leases must, consciously or unconsciously, be based—on Mr. Hunter's

work, might usefully take its place for every-day use ; and the present book is the result. I may add that the main outcome of their application to me has been that I have felt myself entitled to use here and there Mr. Hunter's own words, where they seemed to me felicitous ; and that I have been scrupulous in retaining his references, except where the authorities quoted are plainly obsolete, and in noting the passages in which I have ventured to differ from him.

A retrospect of the impressions made on me in writing the present work and my treatise on Landownership emboldens me to suggest a caution to those who may consult this volume. In the earlier book, the relations discussed were, as a rule, those of persons at arm's-length, depending on the public law and not much complicated by agreements. The relation of landlord and tenant is, on the contrary, in its origin purely contractual. And it should always be borne in mind, before venturing to rely on a precedent, that it may be a safe policy to compare with the contract in hand the whole agreement with which the decision consulted is concerned.

The references to Mr. Hunter's work are to the third edition (1860). The law is brought down to the end of March 1887.

In preparing this work, I have had the kind assistance of many conveyancers of distinction, to whom I beg thus to return my warmest acknowledgments. And I cannot sufficiently congratulate myself on the good fortune of having again had the valuable assistance of my friend, Mr. Alexander Moody Stuart, Advocate, who has gone over the proof-sheets, and made many important suggestions.

J. R.

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- 24 & 25 Vict. c. 17, p. 563.
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- 25 & 26 Vict. c. 37, p. 26.
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 c. 89, § 62, p. 167.
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- 25 & 26 Vict. c. 114, p. 422.
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DEFINITION OF LEASE.

A LEASE or tack is a contract of location (letting to hire) by which one person grants and another accepts certain uses, current or definitive, or the entire control, of lands or other heritages for a period or periods, definite or indefinite, or even in perpetuity, in consideration of the delivery by the grantee of money or commodities or both, periodically or in lump or in both of these ways.¹ The granter is known as the lessor, landlord, or over-lessee, or, if he hold immediately under the landlord, the principal lessee. The grantee is known as the lessee, tenant, tacksman, sublessee, or subtenant. The periodical payment is rent, royalty, or lordship: the lump sum is grassum or foregift. The contract is in its essence purely personal; in certain circumstances it gives rise to what is substantially a real right.

In the course of this work an explanation will be submitted of the details of this definition. On the present page, it is only necessary to discriminate between this contract and other transactions with which it might be confounded. The distinction between a long lease and a feu is more formal and historical than essential.² It will appear in the sequel that a lease of the definitive use of a subject—such as a mineral stratum—can hardly be distinguished from a sale; but it would be a fanciful misuse of words to speak of a lease of land for a grain rent as a contract for the sale and delivery of grain.³ A family settlement may take the form of a lease and yet be refused the interpretation a lease would in other circumstances receive.⁴ may, finally, be observed that the above definition is wide

Distinguished
from other
transactions.

Feu.

Sale.

Family settle-
ments.

Licence.

¹ See St. 2.9.1; Mack. 2.6.5; Bankt. 2.9.1; Ersk. 2.6.20; 2 Ross' Lect. 456; 1 B.C. 65.

² The words of grant were of old similar; and perpetuity is not denied to a lease. See hybrid cases in Buchanan's Trs. v. Pagan, 1868, 7 M. 1; 18 & 19

Vict. c. 88.

³ Henry v. M'Ewan, 1832, 10 S. 572, aff. 7 W. & S. 411.

⁴ Stevenson v. Love, 1842, 4 D. 1322 (long lease, yet held not assignable, the intention being *contra*).

enough, and is meant, to include certain contracts which are denied the name of lease in English law, and are across the Border known as licences. The use of the term licence as signifying the permission to use heritable subjects on another title than demise is scarcely if at all recognised in Scotch law;⁵ and the mere fact that some of the rights and remedies possessed by and competent to landlords and tenants in other circumstances are absent or inappropriate does not seem to be a sufficient reason for refusing to recognise as leases such transactions as the hiring of a sitting in church⁶ or in a place of entertainment;⁷ the grant of a right to take mineral for a period of years at a lordship where there is no obligation on the tenant to work the mines;⁸ or an agreement to take for a rent from a coalmaster the waste water pumped from a pit so long as pumping continues and without reference to any fixed period for the termination of the contract.⁹

⁵ But see *Miller v. Walker*, 1872, 3 R. 242, 248.

⁶ *Clapperton v. Edinburgh Mags.*, 1840, 2 D. 1385.

⁷ *Wood v. Leadbitter*, 13 M. and W. 838.

⁸ *Miller v. Walker*, *supra*, ⁵.

⁹ *Dunlop & Co. v. Steel Co. of Scotland*, 1879, 7 R. 283.

PART I.

CONSTITUTION OF A LEASE.

A. THE PARTIES.

1. PERSONAL AND OFFICIAL DISABILITY (Chap. I.).
2. LIMITATION OF TITLE (Chap. II.).

B. THE SUBJECTS LET (Chap. III.).

C. THE CONTRACT.

1. CONSTITUTION AND PROOF OF A LEASE (Chap. IV.).
2. LEASE AS A REAL RIGHT (Chap. V.).
3. PROROGATION AND RENEWAL (Chap. VI.).
4. RENTAL RIGHTS (Chap. VII.).

THE PARTIES TO A LEASE.

THERE is a presumption, arising from the principle of freedom of contract, that every person—individual or corporate—who is the proprietor of a subject or has a right to the use and possession of it may enter into the contract of lease or into a contract to give a lease, with any other person for such period and on such terms as may be agreed on, and that such other person may lawfully contract with him. But this presumption yields to evidence to the contrary, and that evidence may go to show (1) that either party or both parties are subject to some personal disability to contract, more particularly with reference to heritable estate, or (2) that the first party is subject to some limitation of title. The former sort of disability is part of the law of persons; the latter is part of the law of heritable property. In treating of the former it will be convenient to bring together—as applicable both to lessor and lessee—the rules relating to each cause or source of personal incapacity, along with the modes which the law has adopted to prevent the mischief which would arise from throwing part of the natural resources of the country *extra commercium*. An acquaintance with the general law of persons will be taken for granted,¹ and attention will be directed only to such parts of it as have a direct bearing on the Contract of Lease.

¹ Fraser, Parent and Child, and Husband and Wife; Thoms, Judicial Factors, *passim*.

CHAPTER I.

PERSONAL AND OFFICIAL DISABILITY.

A. DISABILITY TO ENTER INTO THE CONTRACT OF LEASE ARISING FROM PERSONAL INCAPACITY.

I.—PUPILLARITY.

1. *Tutors as Lessors.*

Pupils cannot enter into contracts, and their tutors¹ or administrators-in-law necessarily do for them every competent act relative to leasing, but always subject to the contingency that, if proved to be injurious to the pupil, it can be reduced within the *quadriennium utile*; or, if that be no longer feasible, give rise to an action of damages against them within the same period.² Subject to this qualification, they may grant leases, although the result should be to subject the pupil to a passive title. The doctrine that they cannot, of their own authority, effectually grant leases of a duration longer than that of their offices, uniformly laid down in the books,³ was fixed after solemn consideration of the abstract question.⁴ The rule applies equally to the expiration of the office by the cessation of pupillarity,⁵ by the death of the tutor or of the pupil, by the tutor's resignation, and by his removal as suspect. In a case of the last description, the Court, having removed the tutors, declared that the leases granted should terminate at the ensuing Whitsunday.⁶ The rule seems to exclude the modification suggested by Bankton on the analogy of the Act of Sederunt, 13th February 1730, of an extension for a year beyond the termination of the office;⁷ and not to admit of relaxation, though the ish agreed

Pupillarity—
Tutors as
lessors.

Rule as to
duration of
lease.

¹ Including guardians, under 49 & 50 Vict. c. 27.

² B. Pr. 2087.

³ Cr. 2.10.1; St. 1.6.25, 2.9.3; Mack. 1.7.18; Ersk. 1.7.16; 1 B.C. 133; B. Pr. 1184, 2084.

⁴ L. Reay v. Anderson, 1800, M. 16385; but see 2 Bell, Ill. 175.

⁵ A—— v. Marquis of Huntly, 1672, M. 16285.

⁶ Lothian v. Somerville, 1724, M. 16337.

⁷ Bankt. 1.7.30, and 2.9.18.

on be the date of repayment of a sum of money which has been expended for the pupil's benefit;⁸ or though the pupil was merely *fiar*, and the tutor (or administrator-in-law) the *liferenter*.⁹

Relaxation.

Doubts have been moved of the soundness of the rule which thus limits the duration of leases by tutors,¹⁰ and as a remedy it has been suggested that leasing on terms usual in the circumstances should be held to be an act of ordinary administration done by tutors upon their own responsibility, and only open to reduction upon proof of lesion.¹¹ And now, by the Pupils' Protection Act, 12 & 13 Vict. c. 51, sect. 25, the provisions applicable to judicial factors are extended, so far as possible, to tutors-at-law and tutors-dative.¹² Tutors-nominate were in the year 1886¹³ brought within the scope of that Act; and even before this inclusion they were armed by the Court, on evidence that it was for the interest of the pupil, with special powers to grant leases, at least of agricultural subjects, for the ordinary duration—nineteen years.¹⁴ And the same reasoning would have applied to leases of mines, pasture, &c., of the ordinary duration.¹⁵

Administra-
tion

In settling the terms of a lease, tutors must govern themselves by the rules of sound administration. Even in cases where the Pupils' Protection Act did not apply, the Court have granted special powers to depart from the ordinary course. Thus it has authorised tutors-nominate to let for nineteen years to a previous tenant without advertising the farm, but after a judicial valuation.¹⁶ It may be argued that no distinction will be drawn in practice between cases which do and cases which do not fall under that Act, in regard to the granting of special powers.

Judicial factors
as lessors—
A.S. 13th Feb.
1730.

The Act of Sederunt of 13th February 1730,¹⁷ by a special provision, regulates the duration of leases granted by judicial factors, officers appointed by the Court, and among others, factors *loco tutoris*. By section eighth it is enacted that, 'such factor shall have power to grant tacks or leases to continue during the time that the estate set in tack shall remain under the inspection of the said Lords of Session, and for one year further.'¹⁸ The limitation points, not to the particular factor's

⁸ *Armour v. Lands*, 1671, M. 16284.

⁹ *Rossy v. His Tenants*, 1612, M. 15211.

¹⁰ 1 B.C. 133; 1 Bell, Leases, 133.

¹¹ 1 B.C. 133-4, note.

¹² *Infra*, p. 7.

¹³ 49 & 50 Vict. c. 27, sect. 12.

¹⁴ *Morison's Tutors*, 1857, 19 D. 493,

23 D. 1313, and next case.

¹⁵ See chap. xv.

¹⁶ *Brown's Tutors*, 1867, 5 M. 1046.

¹⁷ Acts of Sed., p. 225.

¹⁸ Bankt. 1.7.29, 71; Ersk. 1.7.10, 2.12.58.

term of office, but to the duration of the factory. In the other details of leasing these officers are said to have been governed by the rules applicable to factors upon estates under sequestration;¹⁹ but this rule probably applied particularly to cases in which the factory must be short-lived,²⁰ and the sounder rule seems to have been that they were entitled to exercise all acts of ordinary administration. Thus they had to do their best to recover rents due both before and during the factory.²¹ All the powers which belong to a proprietor infert might be exercised by them in removing tenants whose leases were expired,²² or who were in arrear.²³ The rule formerly was to let by public auction, even when the same or a higher rent was contemplated;²⁴ but letting privately was afterwards held to be admissible, unless a diminution of the actual rent were contemplated, in which case the factor had to proceed 'according to the rules of law' (i.e., with judicial sanction), and report to the clerk (sect. 4). He had no authority to pursue an action of removing and reduction of a lease on the ground of its being contrary to the terms of an entail.²⁵

As has been already stated, the Pupils' Protection Act of 1849 (12 & 13 Vict. c. 51), applies *inter alios* to factors *loco tutoris*, tutors-at-law, and tutors-dative. It superseded in most part the provisions of the Act of Sederunt, and in particular introduced an improved system of accounting. By the seventh section, as amended by 20 & 21 Vict. c. 56, sects. 4, 5, 6, it is enacted that if at any time it shall appear to the factor that there is a strong expediency for renewing or granting a lease for a period of years, he shall report the same to the accountant of the Court of Session who may order any necessary inquiry, and shall state his opinion in writing. The report and opinion may be submitted by the factor to the Lord Ordinary, with a note praying for the sanction of the Court to the measure proposed. The Lord Ordinary, with or without further inquiry, disposes of the matter himself, subject to the review of the Inner

Pupils' Protection Act—
Special powers.

Special power
of let may be
obtained.

¹⁹ Bankt. 1.7.71-2. See as to these—E. Galloway, 1747, M. 7438; Cawfield, 1758, M. 14346; Campbell, 1755, M. 7445; Proctor, 1824, 2 S. 659; Morrison, 1832, 10 S. 204; Brown, 1832, 11 S. 190; Morison, 1833, 11 S. 326; Milne, 1834, 13 S. 222; 14 S. 561, 681—the probable duration of the sequestration being a leading element. See a curious case where the dispute was as to the validity of a lease, and the subject was let *ad interim* by the

sheriff-clerk on remit; Douglas v. Jones, 1829, 8 S. 274.

²⁰ See Edgar v. Whitehead, 1714, M. 4053.

²¹ 2 B.C. 264.

²² 2 B.C. 264-5; Thomson v. Elderson, 1757, M. 4070.

²³ 2 B.C. 264.

²⁴ St. 4.41.7; 4.51.27, 28.

²⁵ 2 B.C. 264, and Whitson v. Ramsay & Co., 1807, there cited.

House, whose judgment is final ; or, in special cases, if he see cause, report the application. Entailed estates are included.

Cases—Tutors-at-law.

It is settled that a tutor-at-law may competently apply for special powers under this provision, and the only question that has caused any doubt on the Bench, is whether necessity for the powers requires to be shown, or expediency only, the result of the latter view being the risk that the Court might be virtually asked to take over the management of all estates of pupils in Scotland. It would appear that the statute itself gives the criterion—a strong expediency. The risk referred to induced one Division to refuse sanction, first, to a lease of a colliery for fourteen years,²⁶ and afterwards to such leases of land and buildings as would come to an end or might be broken three years after one of the pupil proprietors reached minority ;²⁷ while the other Division entertained no doubt in an intermediate case that the offer of a rent for a period beyond the lapse of pupil-arity, considerably higher than for one limited thereby, was sufficient expediency to warrant the grant of special powers.²⁸ In all these cases the report of the accountant of Court was favourable to the application. Where tutors-at-law were not concerned, the section has been held to admit of special powers being given to grant leases from time to time of numerous small subjects let at £30 or under on one large estate ; the reason being that constant changes of possession occurred. The duration was fixed at not more than nineteen years, and due advertisement was prescribed.²⁹ This was a departure—unavoidable in the circumstances—from the salutary rule that powers of leasing will not be granted *per aversionem* over a whole estate, since in such cases the Court cannot have the whole circumstances before it.³⁰ The Court has sanctioned a year's extension of a current lease to begin after the pupil had attained minority ; being moved thereto by an offer of a greatly increased rent, and the fact that time was required to advertise for a new tenant.³¹ There will be the less difficulty in granting special powers if the pupil be only a *pro indiviso* proprietor and the other co-owners concur ;³² but it will be only under very peculiar circumstances that powers will be granted when they withhold their concurrence.³³

Older cases.

These were all leases of ordinary administration, though of

²⁶ Waddell, 1851, 13 D. 739, explained in Fraser, *infra*,²⁷ ; and following Ross v. Ross, 19th March 1820, F.C. p. 126.

²⁷ Fraser, 1857, 19 D. 801.

²⁸ Kincaid, 1856, 18 D. 1208.

²⁹ Lindsay, 1855, 18 D. 205.

³⁰ Watt, 1856, 18 D. 652.

³¹ Pearson, 1865, 3 M. 883.

³² Fotheringham, 1857, 19 D. 964.

³³ Morrison, 1857, 20 D. 276.

such endurance as to be beyond the factor's or tutor's common powers to grant. A survey of the cases decided before the Act was passed will serve (1) to indicate that the Act was nothing more than declaratory of the existing law in demanding 'strong expediency' and not a balance of advantage on the one hand or absolute necessity on the other; and (2) to suggest the circumstances which may still be likely to weigh with the Court in granting or refusing special power to lease.

The leading rule of the law, apart from statute, is that the Court will not interpose its authority to such acts as must be done in the course of ordinary administration, and which are therefore within the strict and peculiar duty of a tutor or factor *loco tutoris*. For it is not within its province to superintend every common step taken respecting an estate under guardianship or judicial management, and its interference would be attended with detrimental consequences, as it might tend to relieve the administrator of the wholesome responsibility under which he is placed.³⁴ The general doctrine (applicable to all cases of guardianship or judicial factor) has been explicitly recognised as in force, that if no special circumstances are stated, the Court, in appointing, will grant only the usual powers, leaving the tutor or judicial factor to apply for special powers if needed. But, as will immediately appear, these special powers have been granted with more frequency and readiness in recent times than formerly.³⁵ Thus the Court has refused to authorise the granting of leases in terms of missives granted by the former proprietors;³⁶ and, where the factory was drawing to an end, the letting of small farms on lease, which had been held theretofore from year to year, and to spend money on erecting or repairing farm steadings; though it did sanction a lease of a large farm on the same estate for the period of nine years.³⁷ It refused special power to borrow money for the purpose (*inter alia*) of implementing to the tenant the prestations of a lease entered into previously to the commencement of the factory.³⁸ For a similar reason it will always decline to confer special powers on a minor, whether with or without curators.³⁹

Authority to do acts of ordinary duty refused.

³⁴ 2 B.C. 265; Home, 1793, M. 16382; Henderson, 1803, M. 14982; Ross v. Ross, 9th March 1820, F.C. p. 126; Ersk. 1.7.17, Note (by Ivory) 212; 1 B.C. 133; Beatson, 24th Feb. 1810, F.C. 606; Robertson v. Elphinstone, 28th May 1814, F.C. 631.

³⁵ Sharp, 1832, 11 S. 93; Pitcairn, 1838, 1 D. 212; *infra*, p. 11.

³⁶ Home, 1793, M. 16382 (lapsed trust).

³⁷ Cruickshank v. Ewing, 1864, 3 M. 302 (lapsed trust).

³⁸ Henderson, *supra*, ³⁴ (lunatic).

³⁹ Wallace v. Wallace, 8th March 1817, F.C. 322; 1 Ersk. 1.7.16, Note (by Ivory), 208, *infra*, p. 21.

Authority to
do acts of
administration
otherwise
ultra vires.

But the Court is always ready to grant special power to tutors and factors to perform such acts as, if performed by a person of full capacity for the management of his own affairs, would be acts of ordinary administration, but which lie beyond the scope of the common law powers of a mere administrator. Among these acts may be included the granting of leases of ordinary duration. With reference to such acts of ordinary administration (if not also, as seems to have been the intention, to all acts of administration), the following rule, laid down by the whole Court in 1836, may be regarded as sound :—‘Wherever it has been made to appear to the Court that the power craved was either necessary to prevent serious loss to the estate, or expedient in order to procure evident and positive advantage, or where the interest of third parties connected with the estate was concerned, as, *e.g.*, in the relation of superior and vassal, &c. &c., the Court has been in the constant practice of granting the power necessary for accomplishing the object set forth in the petition. Even where only a contingent benefit was in view to the existing estate, and where there was no absolute necessity for the power, and no positive loss would have accrued from the refusal of it, the Court [has] nevertheless granted the power craved.’⁴⁰ This rule does not run counter to those cases which decide that urgent necessity is alone available to induce the Court to sanction sale of the heritable property of an *incapax*,⁴¹ for sale is not an act of ordinary administration.

Old cases.

Though in former times, when the factor or tutor had to proceed by action and not by summary petition, the Court seems to have demanded stronger proof than now of the propriety of granting these powers,⁴² it still admitted ‘evident utility’⁴³ as sufficient. It was satisfied that to grant a mineral lease for twenty-five years was a necessary and proper act of administration, on evidence that a going mine could not profitably be relet for a shorter period;⁴⁴ and special powers were granted on proof that a cotton mill could not profitably be let by a tutor for any period which would not extend beyond the date of his ward’s majority.⁴⁵ In more recent times, powers have been granted on proof that a farm lease could not properly be of less duration than seven years,

Later cases—
Agricultural
leases.

⁴⁰ *Somerville’s Factor*, 1836, 14 S. 451 (borrowing and burdening estate).

⁴¹ *Colt v. Colt*, 1801, M. App. Tutor, No. 1; *Vere v. Dale*, 1804, M. 16389; *Finlaysons v. Finlaysons*, 22nd Dec. 1810, F.C. 114.

⁴² 1 B.C. 133.

⁴³ *Roebuck v. D. Hamilton*, 1761, M.

16387.

⁴⁴ *Colt v. Colt*, 1800, M. 16387; commented on in *Ross v. Ross*, *supra*, ⁴¹; *Colt v. Colt*, 1801, *supra*, ³⁴.

⁴⁵ *Hallows*, 1794, M. 14981 (the point on which the case is reported is that of procedure).

—a period stretching beyond the expected endurance of the factory;⁴⁶ that a farm, if let for less than nineteen years, would suffer a droop, if for nineteen years a rise, of rent;⁴⁷ and that a twelve-years' lease, as craved, would be beneficial to the land let, and might turn out not to be beyond the limits of the factory.⁴⁸ The view that an advantageous lease of a subject will redound to the benefit of all concerned—ward, heir, or substitute; the custom of the country; and the analogy of entail and trust powers as conferred by statute, have all combined to make the Court ready and willing in most cases to sanction leases of agricultural lands for nineteen years or under, whether on fee-simple or on entailed estates.⁴⁹ Where the lands have been let from year to year before the beginning of the factory, this circumstance may lead to a refusal of power to lease for years or to a curtailment of the term sanctioned.⁵⁰ And the necessity of leases in cases to which the Agricultural Holdings Act⁵¹ applies is not now so pressing as it in practice used to be. Powers may be granted, alternative in respect to duration, where the different farms on an estate are susceptible of different treatment;⁵² or the term may be restricted greatly within the ordinary limits, especially if there be opposition by a party interested.⁵³

In regard to minerals, a term of thirty-one years has been recognised as the maximum limit of ordinary leases in entailed⁵⁴ and trust⁵⁵ estates; and the same length of duration has been repeatedly sanctioned where special powers were required.⁵⁶ In one case the term sanctioned was twenty-five,⁵⁷ in another thirty-two years;⁵⁸ in a third, a latitude was allowed.⁵⁹ Probably the Court would be satisfied with nothing short of straitened circumstances in the case of the ward, in authorising the opening of a new field.⁶⁰

Mineral leases.

Authority has been granted to let water power for twenty-one

Miscellaneous.

⁴⁶ Drummond, 1832, 10 S. 216 (lunatic).

⁴⁷ Ball, 1837, 15 S. 1254; Forbes or Carnegie, 1838, 1 D. 355; see A. B., 1829, 7 S. 327.

⁴⁸ Russell, 1840, 2 D. 721 (idiot).

⁴⁹ Slade, 20th Dec. 1831, 10 S. 167; M'Kenzie, 1842, 4 D. 456; A. B., Pet., 27th May 1841, F.C. p. 956; Shepherd, 1841, F.C., p. 1288; 1844, 17 Sc. Jur. 74; Brown, 1846, 9 D. 250; Halkett, 1847, 10 D. 146; Threipland, 1848, 10 D. 1234; Spiers' Tutors, 1848, 10 D. 1474; Spiers, 1854, 17 D. 289; Morison, 1857, 19 D. 493; 1861, 23 D. 1313; Brown's Tutors, 1867, 5 M. 1046.

⁵⁰ Cruickshank v. Ewing, 1864, 3 M. 302.

⁵¹ 46 & 47 Vict. c. 62, *infra*, chap. xii.

⁵² Mackay, 1848, 10 D. 1493 (thirteen and nineteen years, probably on account of part of the lands being pastoral).

⁵³ Martin, 1849, 11 D. 1031.

⁵⁴ 6 & 7 Will. IV. c. 42, sect. 1.

⁵⁵ 30 & 31 Vict. c. 97, sect. 2.

⁵⁶ Moncrieff, 1846, 8 D. 710; Spiers' Tutors, 1848, 10 D. 1474; see Waddell, 1851, 13 D. 739, 23 Sc. Jur. 289.

⁵⁷ Colt, 1800, M. 16387.

⁵⁸ Moncrieff, 1851, 14 D. 13.

⁵⁹ Dobie, 1846, 18 Sc. Jur. 599.

⁶⁰ See last case.

years.⁶¹ The impolicy of precluding a pupil heir from residence in the mansion-house of his estate on reaching puberty or majority will as a rule prevent the Court from sanctioning leases thereof to extend beyond the period of guardianship. But the rule yields to circumstances, such as the fact that the only farm on the estate could not be well let without the mansion-house.⁶²

Renunciation. Before entering into a new lease, it may be necessary to accept renunciation of the old, and power to do so will be granted by the Court on proof that the tenant cannot go on with his lease, and that a new contract would be for the benefit of the estate.⁶³

Grassums. A factor cannot take grassums, nor arrange for new rental rights, these being acts of extraordinary administration, and such besides as the Court would not sanction.⁶⁴

Diminution of rental. If he cannot obtain an offer of rent equal to or higher than the old rent, he should apply for special powers; though the old rule was to test the market by public auction, and accept the highest offer.⁶⁵ In the exercise of its discretion, the Court, on being applied to may or may not order a roup at a reduced upset rent,⁶⁶ and may reject the highest offerer in favour of the old, or of a more suitable, tenant.⁶⁷

Special powers of management. In order to bring into one view the whole doctrine of the assistance given to private administrators in dealing with leases, it may be well to interpolate here a notice of the rules relating to the granting or refusal of special powers, not as heretofore in the constitution of a new lease, but in the management of an existing lease.

Abatement of rent. The Court is very chary of interfering by way of sanctioning an abatement of rent, although the tutor or factor would not be in safety to take such a step without special powers.⁶⁸ Abatement for a year is more readily sanctioned than a reduction for a term of years or for the rest of the lease;⁶⁹ but, even in the latter case, there may be and often are circumstances in which it is plainly a better course to grant a reduction rather than risk the only alternative by accepting a renunciation and advertising for a new tenant. The Court will then authorise an abatement on being satisfied that to keep the tenants bound by the

⁶¹ Spiers' Tutors, *supra*, 56.

⁶² Hill, 1851, 14 D. 13, 23 Sc. Jur. 634. In Spiers, 1854, 17 D. 289, the authority does not seem to have extended beyond the pupillarity.

⁶³ Brown, 1846, 9 D. 250; Wink, 1851, 13 D. 952.

⁶⁴ St. 2.9.17; Bankt. 2.9.41; though they might renew rentals, Stair, *ibid*.

⁶⁵ Cr. 2.10.1; St. 2.9.3; Ersk. 1.7.16.

⁶⁶ M'Lean, 1828, 6 S. 1018.

⁶⁷ Anon., 1850, 12 D. 914, and see 2 B.C. 265; Shaw, 1750, M. 4070.

⁶⁸ Anderson, 1822, 1 S. 363 (N.E. 340); Brodie, 1843, 5 D. 1024.

⁶⁹ Peddie, 1822, 2 S. 88 (N.E. 80); see Robertson, 1823, 2 S. 150, 579 (N.E. 137, 498).

old rent would be injurious not only to them but to the estate, being beyond the actual worth of the land,⁷⁰ or at least largely so,⁷¹ and thus crippling a hitherto solvent tenant and rendering him unfit to do justice to his holding.⁷² These considerations are of special weight in the case of a mineral lease, where much capital is required and the venture is to a large degree speculative.⁷³ An abatement for a year only may be made applicable merely to a single subject or to the whole farms on an estate, and authority will not be given except on a full statement of the circumstances of each parcel, and then only on a just discrimination of the differences that may exist between one subject and another, not solely in the pecuniary position of the tenant, but in its history and natural advantages or drawbacks. The proper course would then be for the Court to fix the abatement applicable to each parcel, after report from a man of skill, but it may alternatively name a maximum percentage of reduction, and allow the tutor or factor discretion within that limit. In no case will a hard and fast reduction all round be sanctioned. In agricultural subjects, a stipulation that the abatement shall be expended on the land in the form of extraneous manures is not unusual and has been approved.⁷⁴ 'Granting abatement of rent either temporarily 'or permanently,' where there is 'strong expediency' is one of the cases provided for in the Pupils' Protection Act,⁷⁵ so that, wherever the Act applies, there must, in the outset, be presented a report by the tutor or factor to the accountant of Court, who gives his opinion on it before the application reaches the Lord Ordinary. Any other alterations, temporary or permanent, on the stipulations of a lease may receive the authority of the Court if they are such as to pass the test—invariably applied—of strong expediency.⁷⁶

Concerning the procedure in applications for special powers, Procedure. it will be enough to say that summary application by note or petition, to the Junior Lord Ordinary or to the Lord Ordinary on the Bills, is now fully established,⁷⁷ and that the sheriff has now jurisdiction to appoint and superintend judicial factors on estates yielding not more than £100 a-year.⁷⁸

⁷⁰ Milne, 1834, 13 S. 222. (There was an alternative to accept renunciations, see 14 S. 561, 681); Annand v. Grant, 7th March 1817, F.C. 319.

⁷¹ Macgregor, 1837, 15 S. 1092; contrast Gardner v. Montgomerie, 1833, 11 S. 325, which went on specialties.

⁷² Anon., 1850, 12 D. 914.

⁷³ Macgregor, *supra*, ⁷¹; White, 1849,

11 D. 1031.

⁷⁴ Grant's Curator, 1880, 7 R. 1014.

⁷⁵ 12 & 13 Vict. c. 51, sect. 5.

⁷⁶ See Macgregor, *supra*, ⁷¹ (change of rotation from five to four shift).

⁷⁷ Thoms on Judicial Factors; 20 & 21 Vict. c. 56.

⁷⁸ 43 & 44 Vict. c. 4.

2. *Pupils as Lessees.*

Pupil as lessee. A pupil may of course by inheritance, bequest, or gift become a lessee, in which case his tutor or the judicial factor appointed to him will have to consider as to the possibility and propriety of carrying on the venture, and at the close of his office will have to account for his intromissions. The pupil himself can neither enter into a new lease nor renew an old one.

Powers and liabilities of guardians.

It has never been determined whether a tutor or factor *loco tutoris* is bound to renew or to attempt to renew a lease which expires during his term of office.⁷⁹ He would probably not be justified in giving any material advance on the rent, or in renewing a lease of a subject of an uncertain or precarious nature. The necessity or strong expediency which would alone justify a tutor, with or without the sanction of the Court, in entering on a lease for the first time, is not likely to arise. And, if the tutor or factor does make the venture from a desire to maintain the ward in the only way open to him, it would probably be held on the analogy of partnership⁸⁰ and of businesses involving risk⁸¹ that he would be liable for loss, if such be the result, and on the other hand be bound to account for all the profits if the venture turns out successful; and that, in the latter case, the Court will condone the speculation after the risk is past, by not withholding from a factor his commission, while it will not authorise *de futuro* any departure from the rule of speedy realisation. In order to facilitate this realisation, it will sanction on due cause shown any agreement with the landlord for a renunciation of a lease.⁸² In one case, where the circumstances were somewhat peculiar, the factor was authorised to sublet.⁸³

Auctor in rem suam.

The rule that a tutor cannot be *auctor in rem suam*, and that therefore 'all rights acquired by the tutor during the 'subsistence of his office in relation to the pupil's affairs, or 'wherein he has any interest, are presumed to be for the behoof 'of the pupil,'⁸⁴ applies to leases. The father of pupils having died in possession of a considerable farm, a tutor-dative was

⁷⁹ See *Parkhill v. Chalmers*, 1771, M. 16365, aff. 2 Pat. 291.

⁸⁰ *Cases of Wilson and M'Aulay* in 2 B.C. 624; *Calder v. Downie*, 11th Dec. 1811, F.C. 390.

⁸¹ *Philip*, 1827, 6 S. 103; *Hamilton*, 1834, 12 S. 924; *Macleod*, 1856, 19 D. 133; *Gilray*, 1872, 10 M. 715; 1876, 3 R. 619. (See case of no risk beyond capital already advanced; *Jamieson*, 1870, 8 M. 976).

⁸² *Forman's Tutors*, 1805, and *Blyth v. Craig*, 1808, Hume 888, 889; *Meikle v. Meikle*, 1823, 2 S. 274 (N.E. 242); *Cockburn's Tutors v. Cockburn*, 1825, 3 S. 642 (N.E. 449); *Warden*, 1829, 7 S. 848, 8 S. 208; *Robertson*, 1841, 3 D. 345; *McEwan*, 1852, 2 Stuart, 137; *Grahame*, 1857, 14 D. 312; *Turner*, 1862, 24 D. 694; *Fraser, Parent and Child*, 259, 503.

⁸³ *Slade*, 1831, 10 S. 167.

⁸⁴ *More's Notes*, 39.

appointed. The tutor, apparently with the approbation of the connections of the pupils, entered into a bargain with the proprietor, by which, after renouncing the subsisting lease, of which there were two years to run, he obtained a new one for fifteen years in his own name at an advance in the rent. This advance, during the two years of the former lease, he became bound to pay to his pupils. While there were four years of this second lease to run, and while the children were still under his care, he obtained another lease for thirteen years on a further advance of rent. He was held liable to account to the wards for the profits arising from the leases during the whole period of his possession.⁸⁵ But this rule of liability does not apply where a *quondam* tutor takes a lease of lands on expiry of his ward's tack and after the ward has reached majority.⁸⁶

The Court has in certain urgent cases appointed an interim manager of a farm;⁸⁷ and this seems the preferable course to that which was adopted in one case of authorising the landlord to cultivate it in conformity with a report by men of skill.⁸⁸

Interim
manager.

II.—INSANITY.

The rules in regard to the disability of pupils to grant or to take leases apply with equal force to persons rendered incapable of managing their own affairs by idiocy, furiosity, senility, or by being deaf-mutes,⁸⁹ and duly recognised as such by cognition or by being placed under curatory; and the mode in which the consequences of defect of capacity are partially obviated in the one case, is closely paralleled by the appointment of curators *bonis*, with power to apply for special powers in the other. Many of the illustrations given above have been drawn from the law of curatory to the insane; and no distinction can be drawn beyond what may fairly be gathered from the certainty of the lapse of the guardianship within a fixed period in the case of a pupil, and the uncertainty of its duration in the case of a party *incapax*, arising from the possibility or probability of convalescence, or of death within a shorter or longer period.⁹⁰ And it may be part of the duty of a curator *bonis*

⁸⁵ *Wilsons v. Wilson*, 1789, M. 16376; *Cochrane v. Black*, 1855, 17 D. 321, 337, per L. Cowan; *Fraser's Parent and Child*, 279, seq.; and *Ludquhairn v. Haddo*, 1632, M. 9503, 16260.

⁸⁶ *Parkhill v. Chalmers*, *supra*, 79.

⁸⁷ *Crichton v. Br. Keith*, 1857, 19 D. 713 (f. *loco absentis*); *Granger v. Geils*, 1857, 19 D. 1010 (pending appeal); *Affleck*

v. Affleck, 1862, 24 D. 291 (litigation as to right of lease).

⁸⁸ *Brock v. Buchanan*, 1851, 13 D. 1069.

⁸⁹ Cr. 1.12.28; St. 1.10.13; *Ersk.* 1.7.49-51; 1 B.C. 137.

⁹⁰ *Bankt.* 1.7.14; *Ersk.* 1.7.16, note; 1 B.C. 136; 1 St. 6.25, *Brodie's Note*; *L. Reay v. Anderson*, 1800, M. 16385.

(as of any one having an interest) to set aside a contract of lease invalidly entered into by his ward prior to the commencement of the curatory.⁹¹ A similar duty on the part of a tutor is scarcely conceivable. There is neither reason, analogy, nor precedent for a resumption of possession by a landlord, in the event of his tenant becoming incapable of managing his own affairs, there being no proper assignation involved in putting the management into the hands of his curator.⁹²

Intoxication.

In order to a reduction of a lease entered into during the temporary mental alienation produced by intoxication, there must have been not merely such a condition as would have made it better for the party not to enter into business at the time, but a perfect incapacity of entering into business transactions, and of completing such as he had begun.⁹³

Interdiction.

The rule that the almost absolute remedy of interdiction is not available to cut down onerous and rational deeds, receives illustration from the law of leases in two reported cases.⁹⁴

III.—FORFEITURE.

Of landlord.

1. *Of Landlord*.—By conviction for high treason, the traitor's real estate is forfeited, and vests in the Crown, which thereafter is alone entitled to deal with it.⁹⁵ Fugitation or outlawry unrelaxed for a year involves liferent escheat to the superior, and Hume suggests that the same rule should apply to persons escaping after sentence of death.⁹⁶ So that leases granted by the traitor or rebel during forfeiture are null; while those granted before forfeiture are valid if the rent be sufficient and the duration ordinary.⁹⁷

Of tenant.

2. *Of Tenant*.—Forfeiture and escheat single and liferent, although by the Statute 20 Geo. II. c. 50, sect. 11, abolished in civil matters, still exist in matters criminal.⁹⁸ By their operation an incapacity to take or hold leases may be produced.

⁹¹ Ersk. 1.7.51; Maxwell v. Bonnar, 1704, M. 6288. Not merely pleaded by exception; Crawford, 1583, M. 6275.

⁹² In partnership there is no proper succession *ex lege*, as in lease.

⁹³ Taylor v. Provan, 1864, 2 M. 1226 (*per* L.J.-C. Inglis). See Haltoun v. Northesk, 1672, M. 13384; St. 1.10.13; Bankt. 1.9.66; Ersk. 3.3.16; 1 B.C. 297; 1 Bell, III. 17; Johnston, 1854, 17 D. 228.

⁹⁴ Kyle v. Ker noted in 5 S. 128 (N.E. 127); Fraser v. Fraser, 1827, 5 S. 301 (N.E. 279). Douglas v. Cranston, 1613, M. 7148, is overruled. See also

St. 1.7.41; Mack. 1.7.16; Bankt. 1.7.126, 130; 1.11.66; Ersk. 1.7.53; 1 B.C. 139; and Christie v. Macdonald, 1870, 7 Sc. L.R. 180.

⁹⁵ 1 Hume, 546; Ersk. 4.4.24; Bankt. 1.5.83.

⁹⁶ 2 Hume, 483.

⁹⁷ Cr. 2.10.8; St. 3.3.32; Mack. Obs. 312; Home, 1570, M. 4684; Dalziel, 1674, M. 4685; M. Huntly, 1677, M. 4689. See M'Crae v. Hyndman, 1836, 15 S. 54, aff. M'L. & Rob. 645.

⁹⁸ Bankt. 2.4.37; Ersk. 2.5.39; B. Pr. 730, 734; Bell's Notes to Hume on Crimes, p. 229.

In terms of 7 Anne, c. 21, forfeitures upon conviction of high treason or misprison of treason are governed by the English rules, which form an integral part of the law of Scotland.⁹⁹ One of these rules prescribes confiscation of real property, and of chattels or moveables.¹⁰⁰ By the law of England, leases for the life of the lessee himself, or for that of another person, are real estates;¹⁰¹ and leases for a determinate period, of whatever length, are chattels, which, although 'savouring of the 'realty,' constitute a portion of the moveable estate.¹⁰² In consequence, the tenant's right in leases, both liferent and for years, must in Scotland accrue to the Crown.¹⁰³

Escheat is *inter essentialia* of a sentence of death, and by special statutes it forms part of the punishment of certain crimes not capital,¹⁰⁴—viz., by 1551, c. 19, of perjury and bigamy; by 1581, c. 118, and 1522, c. 152, of deforcement; by 1581, c. 118, of breach of arrestment; formerly also of usury.¹⁰⁵ But, though the Act 33 & 34 Vict. c. 23, abolishing forfeiture and escheat as a consequence of treason or felony (not, however, of outlawry), does not apply to Scotland, it is unusual to escheat a convict's goods, unless he have been sentenced to death.

Leases (other than liferent leases), although heritable as to succession, fall under the single or simple escheat, by which they devolve to the Crown, to the exclusion of the lessee, his heirs, and all other persons deriving right through him.¹⁰⁶ Doubts have been suggested whether leases of extraordinary duration come under this rule. Steuart says that it 'seems very hard 'that a tack of several nineteen years, exceeding any probable 'amount of the tacksman's life,' should be thus subjected.¹⁰⁷ Mackenzie holds that if a lease be granted for fifty or sixty years, it will fall under the single escheat, but doubts if a lease for a hundred years will.¹⁰⁸ Erskine, on the authority of Steuart, states that 'it would seem that leases of unusual, but 'determinate, duration should fall under, not the single, but

Escheat in crimes.

What falls under escheat —leases other than liferent.

⁹⁹ Bankt. 3.3.4, 36, 41, 47; Ersk. 4.4.24; 1 Hume, 506-7.

¹⁰⁰ Bankt. 3.3.49; Ersk. *ut sup.*; 1 Hume, 538; 2 Blackstone's Com. 386.

¹⁰¹ Woodfall's Landl. and Ten. (13th Ed.) 146; 2 Blackstone's Com. 386-7.

¹⁰² Woodfall, 288; 2 Blackstone's Com. 386-7.

¹⁰³ The provision of the Clan Act, 1 Geo. I. c. 20, which let in the landlord instead, was repealed by 21 Geo. II. c. 34. See 1 Hume, 546, note.

¹⁰⁴ Bankt. 3.3.18; Ersk. 3.5.57; 2 Hume, 464.

¹⁰⁵ 1597, c. 251.

¹⁰⁶ Balfour, 207 and 553-6; Hope's Min. Pract. vii. s. 5, and note, s. 7; Dirl. and Steu. 120; St. 2.1.4, 2.9.24, 3.3.15, 26; Mack. 2.5.25, 26; Bankt. 2.9.30, 2.3.21; Ersk. 2.2.6, 2.5.61; 1 Bell on Leases, 29.

¹⁰⁷ Dirl. and Steu. *ut sup.*

¹⁰⁸ Mack. Obs. 352.

'the liferent escheat.'¹⁰⁹ This opinion is supported by the rule,¹¹⁰ that where the lease is for more than one life, it shall be forfeited during the life of the criminal only, and shall accrue to the surviving lessees. Not only the property belonging to the criminal at the date of his sentence is forfeited, but all that shall accrue to him until he receive a pardon.¹¹¹ In consequence, leases which he shall acquire, either by succession or contract, devolve to the Crown. And it is no bar to the forfeiture of a vested right of lease, that it is expectant on the lapse of a prior right which is being possessed on, at the date of the forfeiture, by another party.¹¹²

Liferent leases. On the preamble that it had not been clearly decided whether a liferent tack should fall under the simple escheat or not, it was, by the Statute 1617, c. 15, enacted that such leases should fall under liferent escheat only. They lapse to the landlord.¹¹³ The Act proceeds to provide, that 'in case any tack, set of lands 'or teinds, contain more liferents nor one,' the person having right to the said tacks, after the decease of the forfeiting liferenter, 'shall brook and injoy the same, notwithstanding 'the saids liferenter's rebellion attour the space of year and 'day; which rebellion shall prejudice himselfe only, and 'no other person succeeding to him in the right of the said 'tack.'

Rentals. Rental rights, although bearing a very close resemblance to liferent leases, and though they have been ranged under the same class,¹¹⁴ yet, not being expressly mentioned in the Act, and not being known under the name of liferent leases, seem to fall under the single escheat.¹¹⁵

IV.—OBSOLETE DISABILITIES.

Papistry. The disability of Papists to enjoy 'tacks of lands,'¹¹⁶ relaxed in 1793,¹¹⁷ was abolished in 1829.¹¹⁸

Trade. The disability of butchers to be graziers over more than one

¹⁰⁹ Ersk. 2.5.70.

¹¹⁰ See next paragraph.

¹¹¹ St. 3.3.15; Bankt. 3.3.21; Ersk. 2.5.61.

¹¹² Hatton v. Murray, 1552, M. 4658; Lindsay v. Bonnitown, 1602, M. 4662.

¹¹³ Hope's Min. Pract. 7.2 and 5, and Note to 5; St. 2.4.62, 2.9.24, 3.3.15; Mack. 2.5.25, 26; Obs. 352; Bankt. 2.4.40, 2.9.46; Ersk. 2.5.61, 66; see

Sandf. Entails, 303; Stuart v. Lady Samuelston, 1631, M. 3623.

¹¹⁴ Bankt. 2.9.45.

¹¹⁵ Balfour, 353; Hope's Min. Pract. t. 7, note to sect. 5.

¹¹⁶ 1700, c. 3; Stewart v. Webster, 1741, Elch. v. Papist, No. 1; Watson v. Gordon, 1783, M. 9615.

¹¹⁷ 33 Geo. III. c. 44; Ersk. 2.3.16, note †.

¹¹⁸ 10 Geo. IV. c. 7.

acre of leased land, the purpose being to prevent forestalling and monopoly,¹¹⁹ is in desuetude.¹²⁰

The common law rules¹²¹ respecting the disability of aliens Alienage. to acquire and hold, *inter alia*, leasehold rights in the United Kingdom, after being in Scotland,¹²² it would seem, brought into conformity with English law,¹²³ were relaxed by the Act 7 & 8 Vict. c. 66; and are now displaced by the Naturalisation Act, 33 Vict. c. 14, which in its 2nd section enacts that 'real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or on succession to an alien in the same manner in all respects as through, from, or on succession to a natural-born British subject: Provided that . . . this section shall not affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the passing of this Act [12th May 1870], or in pursuance of any devolution by law on the death of any person dying before the passing of this Act.' There is no distinction, as in the earlier statute, between alien friends and alien enemies.

V.—MINORITY.

1. *Of Lessor*.—A minor *pubes*, fatherless, and without curators, Without curators. may grant *inter vivos* a lease, since he may convey heritage; but if there be 'enorm lesion,' his deeds are subject to restitution.¹²⁴ Discharges for rent granted by a minor so situated are valid, and the sanction of the Court is neither necessary nor competent.¹²⁵

Where a minor has curators or an administrator-in-law, a deed With curators, but without their consent.

¹¹⁹ 1703, c. 7; 2 Bankt. 9.19; Ogilvie v. Mellis, 1708, M. 2020; Wallace v. Cunningham, 1708, M. 2349; Edinburgh Mags. v. Fleshers, 1799; M. v. Burgh Royal, App. 6.

¹²⁰ Edinburgh Mags., *supra*,¹¹⁹; 1 Bell, Leases, 144.

¹²¹ Cr. 1.14.4, 5; 2.18.24; 2 Bankt. 60.65; Ersk. 3.10.10; B. Pr. 2135; More's Notes, 10; Kincardine's Cred. v. Sommedyke, 1683, M. 4635.

¹²² Leslie v. Forbes, 1749, M. 4636; Leslie v. Grant, 1763, 2 Pat. 68.

¹²³ Authorities in Woodfall, L. and T.

p. 72.

¹²⁴ Balf. 119; Cr. 1.12.30; Mackenzie, 1.7.9; St. 1.6.32, 35, note a; Bankt. 1.7.52; Ersk. 1.7.33; 1 B.C. 134; 1 Bell on Leases, 108; Fraser, Par. and Child, 336; Thomson v. Stevenson, 1666, M. 8982; Clerk's Cred. v. Gordon, 1699, M. 3668.

¹²⁵ Ersk. 1.7.33, Note by Ivory, 228; Hay v. Grant, 1749, M. 8973; Koehler v. Neidrick, 1782, M. 8975; Kirkman v. Pym, 1782, M. 8977; and see Jack v. N.B. Ry., 17th Dec. 1886, 24 Sc.L.R. 211.

of conveyance or a lease granted without their concurrence is challengeable without proof of lesion,¹²⁶ either by action or exception; but the right to challenge may be lost by *mora* or homologation, as in a case where an action of reduction by the minor's heir was thrown out on the ground that it was not brought till thirty-five years after the date of the lease, and thirty-two years after she had succeeded, and that she had drawn the rents without objection during the whole of that latter period.¹²⁷ Similarly, a lease granted by a minor, *proximus major-ennitati*, at an increased rent could not be reduced by him after he had allowed possession to be had for four years after he had reached majority, or five years in all.¹²⁸

With consent
of curators.

A lease by a minor—as lessor—is his own act and deed, his curators, if he have any, being merely consenters.¹²⁹ It is settled law that a minor with consent of his curators can grant deeds alienating his heritage out and out, subject to reduction on proof of lesion.¹³⁰ *A fortiori* therefore he, with the like consent, can grant a lease to endure not only until he attain majority, but for whatever period he and they shall deem proper, subject to the same proviso; and such is the rule,¹³¹ arrived at after some hesitation.¹³² The reason given by Baron Hume in reporting a case in which the nullity of a lease for nineteen years was negatived by the Court, is much to the point—viz., ‘that the law acknowledges a minor as a person who has a will of his own, and who is entitled to administer his property according to his own pleasure, provided only he have his guardian along with him to guide his inexperience and supply the immaturity of his judgment.’¹³³ There seems to be no limitation to the endurance of leases which may be thus granted; though, of course, anything unusual in that respect, as in any other, may go towards proving enorm lesion.¹³⁴

¹²⁶ Balf. 119; Cr. 1.12.30; cf. 2.20.16; Stair, 1.6.33; 1 B.C. 134; Mack. 1.7.9; Bankt. 1.7.56; Ersk. 1.7.33; Seton v. L. Caskieben, 1622, M. 8939.

¹²⁷ Cardross v. Hamilton, 1708, M. 8951; rev. Robertson's App. 37.

¹²⁸ Gordon v. Hall, 1757, M. 15178; and see Harvie v. Gordon, 1726, M. 5712; and obs. in Stevenson v. Adair, 1872, 10 M. 919.

¹²⁹ St. 1.6.35; Mack. 1.7.8; Ersk. 1.7.14.

¹³⁰ Cr. 1.12.30; St. 1.6.44; Bankt. 1.7.52; Ersk. 1.7.33, 34; 1 B.C. 134; Hamilton v. Sharp, 1630, M. 8981;

Thomson v. Stevenson, 1666, M. 8982; Clerk's Cred. v. Gordon, 1699, M. 3668.

¹³¹ 1 B.C. 134; B. Pr. 2096; 1 Bell, Leases, 109.

¹³² Cr. 2.10.1; Bankt. 2.9.18; and Ersk. 1.7.16, limit the duration to that of the curatory; and St. 2.9.3 is not *contra*; but the case referred to by Erskine was one of tutory, and the point is now settled.

¹³³ Alexander v. Thomson, 1813, Hume 411.

¹³⁴ Munro v. Munro, 1735, Elch. Minor, No. 1.

As the lease is the deed of the minor himself, it is invalid, if executed by the curators alone.¹³⁵ If the minor decline to execute the lease, the transaction must be terminated, because there is no mode by which he can be compelled to act, or by which his curator can be authorised to act independently. An application to the Court of Session to compel a minor to concur with his curators, or to authorise them to do without his consent, was refused upon the special ground that his declinature was not unreasonable;¹³⁶ but the 'general opinion' of the Court being that they possessed no *compulsitor*, the case has been viewed as equivalent to a refusal to interpose.¹³⁷ It was held in an old decision that if the minor were furth of the realm the curator might levy his rents,¹³⁸ on the view, no doubt, that this was necessary administration. The more modern procedure would be to obtain the appointment of a factor *loco absentis* if the minor were inaccessible, or his express mandate if not.

The question whether a lease by a minor to his father or to a curator is liable to be set aside, without proof of lesion,¹³⁹ has never been precisely decided; since of the only cases which appear to be in point, one merely held that if the interests of a father and his minor son conflict, a *curator ad litem* will be appointed;¹⁴⁰ and the other, besides involving the rights of third parties, went no further than the Bill Chamber.¹⁴¹ But the general doctrine of *auctor in rem suam* is quite wide enough to embrace the case contemplated, and there can be no difficulty in answering the question in the affirmative.¹⁴²

It results from the recognition of a minor's full capacity to contract (eked out or not, as the case may be, by the consent of his administrator or curators),¹⁴³ that the Court consistently declines to confer on him or them special powers similar to those which it confers every day on judicial factors.¹⁴⁴ But in those few cases in which the Court has made the anomalous appointment of a curator *bonis* to a minor *pubes* (not subject to mental incapacity), it has been strongly argued, though without the support of any

Not by
curators alone.

Lease by minor
to curator or
father.

Special powers
refused.

¹³⁵ Stair, 1.6.35; Mack. 1.7.8; Ersk. 1.7.14; M'Intosh v. Fraser, 1675, M. 11239, 16290; E. Bute v. Campbell, 1725, M. 16338.

¹³⁶ L. Drumore, 1744, M. 8930, 16349 (appointment of factor).

¹³⁷ Note a (by Brodie) to Stair, 1.6.35.

¹³⁸ Crichton v. Crichton, 1660, M. 16228.

¹³⁹ Balfour, 124; Bankt. 1.7.57; Ersk. 1.7.19.

¹⁴⁰ Macneill v. Macneill, 1564, M. 16229.

¹⁴¹ Gillespie v. Clark, 1821; 1 S. 160 (N.E. 153).

¹⁴² On this subject cf. Fraser, Par. and Child, 279, 372; Manuel v. Manuel, 1853, 15 D. 284, and the mass of cases collected in Bell's Prin. (8th ed.) 1998, 2084.

¹⁴³ Munro v. Munro, 1735, Elch. Minor, No. 1.

¹⁴⁴ Wallace v. Wallace, 8 March 1817, F.C. 322.

reported decision, that this officer of Court might demand and obtain the Court's assistance.¹⁴⁵

Minors as
lessees.

2. *Of Lessee*.—Similarly minors—alone, if they have no administrator-at-law or curators; with their consent, if they have such assistance—may enter into leases as tenants,¹⁴⁶ with the additional protection of the power to reduce within the *quadriennium utile* on proof of enorm lesion. None of the cases in which deeds by minors have been sustained, though granted without consent, on the ground of their having fraudulently held themselves out to be major, apply to leases; and it is doubtful how far the doctrine of resting-owing bears analogy to the solemn contract of lease. But transactions in the course of management of the subjects let will share the validity of ordinary trade contracts.¹⁴⁷

VI. MARRIAGE.

Jus mariti
and *jus admini-*
strationis.

1. *Of Female Lessor*.—A married woman cannot grant leases of her separate property without the consent of her husband, because he is her curator or administrator-at-law, and is vested with the right of administering that property,¹⁴⁸ and this rule is not altered by the Married Women's Property Act, 1881, which only withdraws the right of administration (in cases of marriages contracted after 18th July 1881, or of earlier marriages where the Act is adopted) from the rents or produce, not from the *corpus*, of heritable property.¹⁴⁹ But a lease of whatever length, and with whatever stipulations the nature of her title warrants, can be granted by her with her husband's concurrence. Without his wife's consent, a husband can grant leases of her property to last during his administration,¹⁵⁰ on the ground that when so limited they amount merely to an assignation of his *jus mariti*. Where that is excluded—either expressly or under the provisions of the above Act—he has no such power; and, if he grants a

¹⁴⁵ See the admirable chapter on this subject in Thoms' *Judicial Factors* (2nd ed.), and especially p. 269.

¹⁴⁶ 1 Bell, *Leases*, 142; *Hume v. Fish*, 1636, 1 B.S. 94; *Farquhar v. Campbell*, 1628, M. 9022; *Seton v. L. Caskieben*, 1622, M. 8939.

¹⁴⁷ 1 B.C. 135, and cases there.

¹⁴⁸ Reg. Maj. i. c. 30, sect. 6; ii. c. 16, sect. 13; c. 42, sect. 4; iii. c. 17, sect. 2; Quon. Attach. c. 21 and 22; Balf. 95; Cr. 1.12.28; Mack. 1.6.7; St. 1.4.9, 13; Bankt. 1.5.66; Ersk. 1.6.13, 22, 27; 1 B.C.

60-1 and 632; B. Pr. 1618; *Bullions v. Bayne*, 1793, M. 6149; *Boyle v. Crawford*, 1822, 1 S. 372 (N.E. 350). *Gemmill v. Yule*, 1735, M. 5997; *Elch. v. Husband and Wife*, No. 4, is not *contra*, since it related to *paraphernalia*.

¹⁴⁹ 44 & 45 Vict. c. 21, sect. 2.

¹⁵⁰ Ersk. 2.6.21, Note (by Ivory) 95; B. Pr. 1184, 1594; *More's Notes*, 20; *Fraser, H. & W.* 812; *Grieve v. Pringle*, 1797, M. 5951. *Gibson v. Aitken*, 1798, *Hume* 205, *contra*.

lease on the contrary assumption he may expose himself to an action of damages.¹⁵¹ If, while a minor, a married woman grants a lease with her husband's consent, she is, like any other minor, entitled to reduce it within the *quadriennium utile* on proving enorm lesion.¹⁵²

Contrary to the views of our earlier lawyers¹⁵³ (except Dirleton¹⁵⁴) it is now settled that the husband's right of administration, like the *jus mariti*, may be excluded¹⁵⁵ or by him renounced,¹⁵⁶ either expressly or by such general words as necessarily imply exclusion or renunciation.¹⁵⁷ Thus, by a deed of separation a husband renounced his *jus mariti* and all other right and title to the rents of subjects of which his wife, through a former husband, enjoyed a liferent, and declared that her own receipts should be sufficient. A lease of her life interest was granted her without her husband's consent. The fiar, having obtained a renunciation of the lessor's liferent right, raised a reduction of the lease upon the ground of the absence of the husband's consent. But the lease was sustained, because the right of administration might in law be, and in fact had been, effectually renounced.¹⁵⁸ The effect of such renunciation or exclusion of the right of administration, coupled with an express or a statutory withdrawal of the *jus mariti*, is, *inter alia*, to oust the husband from the management of the wife's separate property, and to enable her to lease it out as she pleases.¹⁵⁹

Mere separation of the spouses does not, at common law, involve a withdrawal of the husband's curatorial power;¹⁶⁰ but a decree of separation *a mensa et thoro*, and a protection order under the Conjugal Rights Act, 1861, have each the effect of making a wife capable of entering into obligations, liable for wrongs and injuries, and capable of suing and being sued, as if she were not

Exclusion of
jus administra-
tionis.

Effect of
separation.

¹⁵¹ Kennedy v. Watson, 1848, 11 D. 171, per L.J.-C.

¹⁵² Gibson v. Scoon, 6th June 1809, F.C. p. 291.

¹⁵³ St. 1.4.9, and Note a (by Brodie); Fowlis v. Innertyle Tenants, 1667, M. 5828; Nicolson v. Inglis, 1678, M. 5834; Vallance v. M'Dowall, 1709, M. 5840.

¹⁵⁴ Dir., *voce Jus mariti*.

¹⁵⁵ Mack. 1.6.7; Ersk. 1.6.14, 22, Note (by Ivory) 154; Ersk. Pr. 1.6.15; 1 B.C. 638; St. 1.4.9, Note (by Brodie); Anand v. Chessels, 1774, M. 5844, aff. 2 Pat. 369; Gowan v. Pursell, 17th May 1822, 1 S. 418 (N.E. 390).

¹⁵⁶ Bankt. 1.5.8; Ersk. 1.6.14.22, Note (by Ivory) 154; 1 B.C. 638; St. 1.4.9, Note a (by Brodie); Walker v. Creditors, 1730, M. 5841; Murray's Trs. v. Dalrymple, 1745, M. 5842.

¹⁵⁷ Gowan v. Pursell, *supra*,¹⁵⁰; Wilson's Trs. v. Wilson's Factor, 1868, 7 M. 136.

¹⁵⁸ Keggie v. Christie, 25th May 1815, F.C. p. 374.

¹⁵⁹ Gowan, ¹⁵²; Keggie, ¹⁵³; Gordon v. Gordon, 1832, 11 S. 36; Graham v. Hunter's Trs., 1831, 9 S. 543.

¹⁶⁰ Ersk. 1.6.25; 1 B.C. 643; Bullions v. Bayne, and Boyle v. Crawford, ¹⁵⁵, and see Baillie v. Lady Letham, 1630, M. 5981 and 5998, and 1 Bell, Leases, 107.

married.¹⁶¹ These words are wide enough to include obligations and suits regarding her heritable property, and do not seem to be restricted by the context, which only relates to property falling under the *jus mariti*.¹⁶² And in contracts of separation a renunciation of the *jus administrationis* may be inserted, and will be given effect to.¹⁶³ The Court would probably sustain leases granted in ordinary administration by a married woman, especially if necessary for securing her an aliment, on the same principle as it has allowed action for rents,¹⁶⁴ and declared them not attachable by the husband's creditors.¹⁶⁵ And now, when a wife is deserted by her husband, or is living apart from him with his consent, a Judge of the Court of Session or Sheriff-Court may, on petition, dispense with his consent to any deed relating to her estate.¹⁶⁶ It is certain that his insanity¹⁶⁷ and civil death¹⁶⁸ (by outlawry, or sentence of death, or penal servitude) dispenses with it, subject to revival on convalescence in the one case, and pardon, relaxation, or release in the other.

Of divorce.

In divorce, the guilty husband loses all right to courtesy and to control of his wife's separate heritable estate, and the wife is entitled to terce. The guilty wife is excluded from terce, and must yield to the courtesy. If both are guilty, each forfeits all right in or to the property of the other. If the legal liferents of terce and courtesy are excluded, husband and wife return to the full control of their respective heritable estates.¹⁶⁹

Married woman as lessee.

2. *Of Female Lessee*.—There is no disability arising from sex to take or hold a lease, and the only question has been as to the effect of coverture. After a great deal of learning¹⁷⁰ and decision¹⁷¹ to the contrary it is now established that, whether a lease granted to or otherwise vested in an unmarried woman contains an exclusion of assignees or not, it is neither forfeited

¹⁶¹ 24 & 25 Vict. c. 86, sects. 5 and 6; Fraser, H. & W. 552.

¹⁶² Ibid. sect. 19, and see the earlier case of *Ritchie v. Barclay*, 1845, 7 D. 819. The dispute arose out of alleged delict in ejecting a tenant from premises let by the wife and a factor (wrongly called *curator bonis*) appointed to a lapsed trust in her favour.

¹⁶³ *Keggie v. Christie*, *supra*, 163.

¹⁶⁴ *Carmichael v. Chancellor*, 1694, 4 B.S. 151.

¹⁶⁵ *Jameson v. Houston*, 1770, M. 5898 (she had been left in sole possession

for seventeen years).

¹⁶⁶ 44 & 45 Vict. c. 21, sect. 5.

¹⁶⁷ Authorities in Fraser, H. & W. 547, 819.

¹⁶⁸ Ibid. pp. 546, 780, 818.

¹⁶⁹ Fraser, H. & W. 1216; *Innerwick v. Innerwick*, 1529, M. 329; *E. Elgin v. Ferguson*, 1827, 5 S. 243 (N.E. 226).

¹⁷⁰ Balf. 206; Cr. 2.10.6; St. 2.9.26; Bankt. 2.9.13; Ersk. 2.6.31; 2 Ross, 483; Kames in *Elliot v. D. Buccleuch*, 1747, M. 10332, being alone *contra*.

¹⁷¹ Cases in Balf. *supra*, 170; *Home v. Taylor*, 1734, M. 7199.

nor carried to her husband by her marriage,¹⁷² for in full view of these authorities it was decided that, a lease having been granted for a term of years to a man and his wife, and the longest liver, and the heirs of the longest liver, but secluding assignees, and the wife surviving and continuing in possession of the farm, the right was not irritated by her subsequent marriage.¹⁷³ And, though it has never been decided that a lease can be taken by a married woman, as lessee, without conjunction with her husband, the competency thereof is plainly involved in cases in which she has been recognised as holding a joint tenancy with him, and the full right on her surviving.¹⁷⁴ The landlord would in such a case take care that the husband and his creditors should not be entitled to interfere. If, on the other hand, she acquires a current lease by succession, gift, or onerous assignation, there might have been at one time a difficulty arising from the husband's *jus mariti* over the stock and other moveables, either acquired with the subject let or afterwards put upon it;¹⁷⁵ and this difficulty may go far to explain the absence of authority on the matter. But in the case of marriages contracted after 18th July 1881, these moveables vest in the wife as her separate estate, and spouses married before that date are, subject to certain conditions, entitled to put themselves under the statute by agreement.¹⁷⁶

The rules stated above¹⁷⁷ in regard to the case of a married woman, *quâ* lessor, who is separated or divorced from or deserted by her husband, are applicable, *mutatis mutandis*, where she is a lessee, with this distinction, however, in favour of her freedom of action, that, where a lease is simply an implement of a trade carried on by her in her own name there can be no doubt that, apart from statute, she is entitled to enter into the contract, and that she may enjoy all the rights, and will be amenable to all the liabilities, which it involves.¹⁷⁸

Effect of
separation and
divorce.

B. DISABILITY ARISING FROM OFFICE.

I. TRUST ADMINISTRATION.

It remains to consider a number of cases in which limitations in

¹⁷² 1 B.C. 76, note; B. Pr. 1218; More's Notes, 248; Ersk. 2.6.31, note *; St. 2.9, p. 372, Note (by Brodie); *per* Lord Glenlee in *Forrester v. Milligan*, 1830, 8 S. 992-4; not questioned in *Edmond v. Reid*, 1871, 9 Macph. 782.

¹⁷³ *Gillon v. Muirhead*, 1775, M. 15286, Hailes 631; said by Mr. Bell (*Com. supra*, ¹⁷²) to have been affirmed on appeal; but see 3 Pat. 681.

¹⁷⁴ *Gillon v. Muirhead*, ¹⁷³, and *Forrester v. Milligan*, ¹⁷².

¹⁷⁵ See Ersk. 2.6.31.

¹⁷⁶ 44 & 45 Vict. c. 21, sects. 1-4.

¹⁷⁷ *Supra*, p. 23.

¹⁷⁸ *Arg.* from *Churnside v. Currie*, 1789, M. 6082; *Orme v. Diffors*, 1833, 12 S. 149; *Fraser, H. & W.* 552; and see 40 & 41 Vict. c. 29.

the power of certain persons to grant or take leases depend, not on anything affecting their capacity as individuals, but on the restricted nature of some office or trust conferred or imposed on them. This office or trust may be more or less of a public nature, or it may be the result of the exigencies of private life. Of the former sort is the administration of Crown, Church, and corporate property. Of the latter sort—besides the cases taken up above more conveniently under the head of personal incapacity—is the administration of private trustees, factors, and appointees under powers. The cardinal rule, common to all these offices, is that the officer or trustee is not entitled to stray beyond the powers conferred on him by his commission. But the nature and extent of these powers have to be gathered, not only from the deed appointing him and the express directions set forth for his guidance, but also from the dictates of the common law and statute. It is, therefore, of some importance to state shortly the special rules applicable to each of the administrators referred to. In each case the administrator will be regarded first as lessor and then as lessee, following the arrangement hitherto adopted.

General rule.

1. THE CROWN.

Leases from
Crown—of
land.

(a) *The Crown as Lessor*.—The management of Crown lands (as distinguished from the private estates of the sovereign¹⁷⁹) was transferred from the Officers of Exchequer to the Commissioners of Woods and Forests in 1833,¹⁸⁰ and the powers of an earlier English Act¹⁸¹ were at the same time applied to Scotland.¹⁸² These powers extend to the lands and other property of the Prince of Scotland. They are limited in various ways, of which, in the matter of leases, the following are the most important:—

Leases for thirty-one years may be granted of subjects of any description (Act 1829, sect. 22), and now, with consent of the Treasury, leases of mines (other than mines of gold and silver), minerals, or other metallic or non-metallic substances or substrata, obtained by mining, quarrying, or excavating, may be granted or extended for a period of sixty-three years,¹⁸³ and a grassum may be taken.¹⁸⁴ Leases for building or garden ground may be made for ninety-nine years (Act 1829, sect. 23); the rent under such leases may be nominal for the first three years

¹⁷⁹ 25 & 26 Vict. c. 37; 36 & 37 Vict. c. 61; 37 & 38 Vict. c. 94, sect. 60.

¹⁸⁰ 2 & 3 Will. IV. c. 112; 3 & 4 Will. IV. c. 69, sects. 2, 3, and see 14 & 15 Vict. c. 42, sects. 1, 2.

¹⁸¹ 10 Geo. IV. c. 50 (1829).

¹⁸² 3 & 4 Will. IV. c. 69, sect. 3.

¹⁸³ 36 & 37 Vict. c. 36, sect. 4.

¹⁸⁴ 29 & 30 Vict. c. 62, sect. 3.

(sect. 30). In leases of minerals the rent may be either in money, or in money and a share of the produce, or by way of a royalty (sect. 33). Power is given to distrain for rent (sect. 90). Lessees, at a rent exceeding £50, have to pay five per cent. on arrears after the lapse of three months from the date of the demand (sect. 91); and the Commissioners are empowered to compound for arrears (sect. 93). Disputes respecting boundaries, extent, or servitudes are to be settled by arbitration (sect. 95). Mines and quarries, in or under the foreshore, are specially excepted from the provisions which transfer the management of that territory to the Board of Trade.¹⁸⁵ Duplicates of leases are to be transmitted to be recorded in the Office of Chancery in Scotland.¹⁸⁶ An attested copy or extract from this record of any lease recorded for behoof of the Crown is equivalent to the principal, and may be recorded as if it were the principal in the books of Council and Session.¹⁸⁷ And the Statute 15 & 16 Vict. c. 62 (30th June 1852), section eleventh, enacts that a minute and memorandum describing the document entered in the Minute-Book of the Office of Chancery in Scotland shall be a sufficient compliance with 3 & 4 Will. IV. c. 69.

In consequence of recent alienations of Crown lands in Scotland these rules have become of less practical importance than formerly, so far as corporeal property is concerned. Such lettable lands as remain are leased out conform to the same rules of good management as in leases between subject and subject. But a considerable revenue is now obtained by the Crown from the letting of salmon fishings in rivers and in the sea and estuaries within three miles of low-water mark. The rule of the Office is always to give the proprietor *ex adverso* an opportunity of taking the fishings himself, but in many cases he does not tender, and they are then let to a third party. The lessees are taken bound not to interfere with fishings *ex adverso* of lands other than those mentioned in the lease. But a Crown lease, obtained after the lessee had been interdicted from fishing from his own lands by the opposite riparian owner, is a sufficient answer to a complaint for breach of interdict, leaving the question of property to be decided by declarator or reduction.¹⁸⁸ Provision is made for putting the contract to an end in the event of legislative prohibition of stake or bag nets. The duration of the leases varies in practice, and is usually between seven and eleven years. There is no rule as to the exclusion of assignees. Entry is at Martinmas,

Of salmon
fishings.

¹⁸⁵ 29 & 30 Vict. c. 62, sect. 21.

¹⁸⁶ 3 & 4 Will. IV. c. 69, sect. 7.

¹⁸⁷ 36 & 37 Vict. c. 62, sect. 5.

¹⁸⁸ *Lovat v. Macdonell*, 1868, 6 M. 330.

and the lessee is bound, if required, to take over the tackle and material of the outgoing tenant at a valuation. The offer is by circular, and is accepted by written tender.¹⁸⁹ The lessee is bound to defend himself against any unjust claim by a third party, and is not entitled, without special stipulation, to be relieved of the expenses thereby entailed, though the untenability of the claim be afterwards established.¹⁹⁰

Of foreshore
and oyster and
mussel fish-
ings.

The Board of Trade, which now has the management of the foreshore¹⁹¹ (with the exception of minerals under it),¹⁹² is in the habit of granting leases thereof to the proprietors of the land *ex adverso*, not entitled to the ownership under their charters.¹⁹³ And it is empowered to grant an order (substantially though not in name a lease) for the establishment, improvement, maintenance, and regulation of oyster and mussel fisheries on the shore and bed of the sea or of an estuary or tidal river, above or below or partly above and partly below low-water mark, for not more than sixty years, with certain rights to the use of the *solum*.¹⁹⁴ The Act has been practically a dead-letter (though one or two applications have been made), principally on account of the expense attending the preliminary inquiry which has to be made in the interests of the public.

The Admiralty and War Departments have occasionally both to give and take leases of land in Scotland, but there is nothing in their practice to call for comment.

(b) *The Crown as Lessee*.—On the other hand, the Woods and Forests Commissioners are entitled to take leases on such terms as they think fit (Act 1829, sect. 47); to purchase current leases (sect. 48); and in either case to cause them to be granted or assigned (as the case may be) to a trustee or trustees for the Crown (sect. 49), or to allow them to merge (sect. 50).

Gift to
donatary.

Leases of the property of subjects may accrue to the Crown by forfeiture or escheat, or by default of heirs, in consequence of the total failure of heirs to a person of lawful birth, or by the death of a bastard without issue. But as it is an established rule that the sovereign cannot act in a subordinate capacity, he cannot be the lessee of his subject,¹⁹⁵ and therefore he transfers by a gift to a donatary leases so accruing. It has been decided that the sovereign cannot transfer to a donatary a lease accruing

¹⁸⁹ *Stephen v. Lord Advocate*, 1868, 6 R. 282.

¹⁹⁰ I am indebted for information as to practice to the kindness of the solicitor to the Woods and Forest Department.

¹⁹¹ 29 & 30 Vict. c. 62, sects. 7 *et seq.*

¹⁹² *Ibid.* sect. 21.

¹⁹³ *Stephen*, 189.

¹⁹⁴ 31 & 32 Vict. c. 45, sects. 5, 28, 29-42.

¹⁹⁵ *Falconer v. Hay*, 1789, M. 1355.

ob defectum hæredis if assignees and sublessees are excluded; and a general opinion was expressed that the same rule applied even where there were no such exclusion.¹⁹⁶ But from this opinion leases accruing by forfeiture or escheat are excluded, because it is expressly limited to those accruing *ob defectum hæredis*. Were it of general operation it would be equivalent to a rule that leases cannot devolve to the Crown—contrary to the rule that leases fall under forfeiture and escheat,¹⁹⁷ and are in terms included under gifts of escheat.¹⁹⁸ Although the sovereign has the absolute power of disposal, the gift is generally made to the creditors or relations of the criminal.¹⁹⁹

2. THE CHURCH.

The right of the minister of a parish to the enjoyment of the manse and glebe being limited, not by a concurrent right in any other person, but by the circumstance that he is *curator beneficii* no less than holder of an usufructuary right during his incumbency,²⁰⁰ he may properly be regarded as an administrator for himself and the Church, rather than as a limited owner.

Leases of manses which before the Reformation were inadmissible even for a short period of years,²⁰¹ were frequently resorted to soon after the Reformation, as a means of evading the encroachments of the Protestant clergy and laity, and had to be restrained by Act of Parliament.²⁰² Indications in the statute book that manses were intended for the residence of the parish ministers do not go the length of prohibiting their residence elsewhere, at least within the parish.²⁰³ The legislature in both sets of Acts merely had in view the proper administration of ordinances, and the preservation of the benefice from alteration for purposes for which it was never intended. While it is probable that for urgent sanitary reasons the minister might desert his manse, it is equally probable that he would not be entitled to leave it unoccupied and exposed to the deterioration involved therein for the mere sake of convenience, or to let it for a year, or term of years, or during his incumbency, or for any other purpose except as a residence. In some of these cases,

¹⁹⁶ *Falconer v. Hay*, 195.

¹⁹⁷ *Supra*, p. 16.

¹⁹⁸ 1 Dallas, part ii. pp. 91 and 95.

¹⁹⁹ 3 Jurid. Styles, 2nd ed. 196.

²⁰⁰ He has been called, like an English rector, a corporation sole. B. Pr. 2176; Clark on Partnership, i. 35; and see Duncan's Par. Law, 388.

²⁰¹ Balfour, 204; Parson of Muckarsie

v. Abercromby, 1558, M. 7935 (five years).

²⁰² 1563, c. 72; 1572, c. 48; Bulk of the Universal Kirk, p. 12; St. 2.3.40; Mackenz. Obs. 166, 183; Forb. 222; Bankt. 2.8.119; Ersk. 2.10.56; Connell on Par. pp. 242-45, 339-40, 425.

²⁰³ 1584, c. 132; 1587, c. 29; Min. of Falkland *v. Johnston*, 1793, M. 5155.

he would fail to satisfy the demand of the presbytery for 'due residence,' in others, the demand of the heritors, that the subjects be kept in proper repair. But nothing is more common than for a minister to let his house as a residence during his holiday, and even for short periods also before or after the same, while he resides elsewhere in the parish or neighbourhood. And it is now settled that, so long as the heritors find nothing to complain of in the way of injury to the fabric or its adjuncts, they have no title to interfere.²⁰⁴ It is quite a different question when and how the minister's ecclesiastical superiors would be entitled to interfere for the purpose of enforcing 'due residence.' The rules as to removing will necessarily be the same as those which obtain with reference to glebes.²⁰⁵

Glebes.

While the letting of manses is exceptional, the letting of glebes (including the minister's grass as well as glebes proper), is an ordinary mode of administration, and one which leaves the incumbent free to do his professional work. It has accordingly been always recognised as lawful.²⁰⁶ But at common law the lease is limited by the duration of the lessor's incumbency, and is therefore *ipso facto* terminated by his death or deposition, or the acceptance of his resignation by the presbytery. The new incumbent is entitled to the full unburdened possession on being inducted. In the interval the tenant's possession is *sine titulo*, and may be summarily brought to an end by the newly-inducted minister, contrary to the rule in the case of leases granted by a liferenter.²⁰⁷ The rule is general, and does not give way to circumstances specially favourable to the tenant.²⁰⁸ The only relaxation at common law occurs when a crop has been sown prior to the vacancy, or at least prior to the induction of the new incumbent. The tenant is then allowed to occupy the ground sown for the purpose of reaping the crop even after the latter date, on the principle that *messis sementem sequitur*.²⁰⁹

²⁰⁴ *Aberdour Heritors v. Roddick*, 1871, 10 M. 221; and see *Couper v. Bruce*, 1602, M. 13831; *Maccallum v. Grant*, 1826, 4 S. 527 (N.E. 535); *Lockerby v. Stirling*, 1835, 13 S. 978; *Duncan's Paroch. Law*, 391.

²⁰⁵ *Couper v. Bruce*, *supra*, ²⁰⁴.

²⁰⁶ The prohibition in 1572, c. 48, obviously referred only to alienations by long leases, or at least by leases to the

prejudice of the succeeding incumbent. *Ersk.* 2.10.6; *Maccallum v. Grant*, *supra*, ²⁰⁴.

²⁰⁷ *Maccallum v. Grant*, *supra*, ²⁰⁴, and authorities there; *Dunlop*, *Par. Law*, 177; *Duncan*, *Paroch. Law*, 135, 398, 541.

²⁰⁸ See speculations of *Ll. Alloway and Glenlee* in *Maccallum*, ²⁰⁴.

²⁰⁹ *Colvil v. Balmerino*, 1665, M. 464.

But now statute has introduced a relaxation of the strict rule in two directions. In the first place—

‘A minister may, with consent and approval of the heritors (*i.e.*, proprietors of lands of £100 real rent), and the presbytery, grant a lease or leases of his glebe, or any part or parts thereof, reserving for the use of the minister not less than five imperial acres, nearest and most convenient to the manse, which shall be marked out by the heritors and the presbytery, for any term not exceeding eleven years, for such yearly rent or rents, and upon such condition or conditions as shall be approved of by the heritors and the presbytery; but without any foregift or grassum, and under the special condition if the said reserved five acres be included in the said lease, that such lease, in so far as they are concerned, shall cease and determine at the first term of Martinmas six months after the death, deprivation, resignation, or translation of the minister of the parish, such consent and approval of the heritors and the presbytery to be signified by a certificate written on the lease or leases, and signed by the clerk to the heritors, and by the moderator and clerk of such presbytery; and the rent or rents payable under such lease or leases shall be paid and belong to the minister.’²¹⁰

Statutory powers to let.

Power to grant leases not exceeding eleven years.

In the second place, the minister may, with the consent of the presbytery, and of two-thirds in value of the heritors, obtain from the Court of Teinds authority to let his glebe, or any part of it, for any term not exceeding ninety-nine years on building lease.²¹¹ This is an alternative to feuing the glebe. As feuing has been found to be the more convenient mode, it will be unnecessary to do more than refer to the Act for a statement of the procedure,²¹² and the right of a neighbouring heritor to object on the score of amenity,²¹³ and to have the first offer.²¹⁴ The rents are to be enjoyed by each incumbent in full (sect. 16).

Long leases.

In spite of opinions to the contrary in last century,²¹⁵ it is now recognised in practice that the glebe and the minister's right to it extend *a cælo usque ad centrum*, with this limitation, however, that what is below the surface being *pars soli* and in no sense a fruit of the glebe, if it be taken away, must be taken for behoof of the benefice and not of the incumbent for the time

Minerals.

²¹⁰ 29 & 30 Vict. c. 71, sect. 3.

²¹¹ 29 & 30 Vict. c. 71, sect. 5 *et seq.*

²¹² Sect. 6 *et seq.*

²¹³ Sect. 11.

²¹⁴ Sect. 17; 37 & 38 Vict. c. 94, sect. 36. The cases, which all relate to feus, are reported in 6 M. 284, 970;

5 Sc.L.R. 631; 7 M. 88; 8 M. 955;

11 M. 80, 251; 1 R. 187, 934; 2 R. 488.

²¹⁵ Obs. of L.P. Dundas and L. Monboddo, in *Reay v. Falconer*, 1781, 2 Hailes 890.

being alone.²¹⁶ Therefore minerals are leased by the incumbent, with consent of the heritors and the presbytery, and the rents are funded or laid out in permanent investment, and the interest only paid to each incumbent.

Mortified
lands.

It may be a question whether lands, not properly glebe, but settled in perpetuity 'on the minister for the time being, 'and enjoyed by him along with his glebe,'²¹⁷ will follow the rule of lands let by liferenters, or the analogy of glebes, in the matter of removing.²¹⁸ It is expressly provided, however, that they are to have the benefit of the Act 1866 referred to above.²¹⁹

3. CORPORATIONS.

(1) *As Lessors.*

The general rule in regard to corporations, however constituted, is that they are entitled to grant, or take and hold leases, subject to any limitation of power contained in their memorandum, articles, charter, or other constitution, or elsewhere. The power to grant and take leases is sometimes specially conferred in these constitutive documents.²²⁰ The other contracting party should in every case satisfy himself of the power of the officials to bind the corporation, and of the mode in which this can be done.²²¹ The deeds should, as a rule, run in the corporate name, and be sealed with the corporate seal.²²² Only two sorts of corporations require to be further mentioned here. These are Universities and Burghs.

(a) *Universities.*—The power of administering the property of universities was held in various hands prior to the Universities Act of 1858;²²³ but that statute appointed the *Senatus Academicus* in each case to 'administer the property and revenues, subject 'to the control and review of the University Court' (sect. 5). There is no rule, either in the statute, or in the ordinances of the Commissioners or of the Queen in Council, which have been issued in pursuance of the statute, limiting the power of granting or taking leases, good administration being sufficiently secured by the character of these bodies; which would probably not be

²¹⁶ *Minister v. Hers.* of Newton, 1807, M. Glebe Appx. No. 6; and see *Min. v. Hers.* of Madderty, 1794, M. 5153, Bell Fol. Ca. 76; *Logan v. Reid*, 1799, M. Glebe Appx. No. 1.

²¹⁷ *Min. of Buittle*, 22nd Nov. 1809, F.C. 10, n.; *Allan v. King's Coll.* of Aberdeen, 23rd Jan. 1811, F.C. 158; 2 Connell, Tithes, 136.

²¹⁸ Probably the latter, since death is not the only termination of the minis-

ter's right. *Allan v. King's College*, ²¹⁷, is not *contra*.

²¹⁹ 29 & 30 Vict. c. 71, sect. 2.

²²⁰ 1 Bankt. 2.27; 1 Ersk. 7.64; 2 B.C. 167, 656; 1 Ross' Lect. 83; Spott. Styl. 15-16; Steu. Ans. to Dirl. 89.

²²¹ *Edinburgh Hammermen v. Stewart*, 1664, M. 2541.

²²² Clark on Partnership, i. 179.

²²³ 21 & 22 Vict. c. 83.

bound by ancient *dicta* or decisions,²²⁴ except so far as these may import a prohibition against leases of such undue length as to amount to alienation in the narrower sense of the word, or on such terms as unduly to anticipate revenue by way of grassum.

(b) *Burghs*, (a) *Royal*.—A lease by a royal burgh should proceed, as its warrant, on a previous Act of Council, or of the interim managers properly convened,²²⁵ or where the property of the burgh is being administered by a judicial factor²²⁶ on the authority of the Court of Session. The necessity for an Act of Council or managers has statutory authority on one, and apparently the better, reading of the Act 3 Geo. IV. c. 91, sects. 5, 6, 8, and 11. The fifth section provides that all feus, alienations, or tacks for more than one year of an heritable property, being part of the common good of such burgh, and tacks of the common good shall proceed by public roup or auction, of which public notice shall be given by advertisement published once at least twenty days preceding the day of roup or auction in some newspaper printed in such burgh if any such newspaper is there printed, and, if no such newspaper is there printed, then in some newspaper published in the county wherein such burgh is situated, or if no such newspaper is published in such county, then in a newspaper published in the next adjoining county or counties in circulation in such burgh, and also by written or printed notices affixed and continued upon at least three conspicuous places in the said burgh, of which the door of the principal church shall be one, at least twenty days preceding the day of such roup or auction. The eighth section enacts that, in the event of these transactions taking place otherwise than by public roup and after proper notice, the members of council who were instrumental in authorising the same are to forfeit a sum not exceeding £50 each, and the ‘feus, alienations, leases, or ‘tacks shall be altogether void and null.’ The eleventh section provides that ‘it shall not be lawful for the magistrates or the ‘town council of any burgh to contract any debt, grant any ‘obligation, make any agreement, or enter into any engagement ‘which shall have the effect of binding them or their successors ‘in office, unless an Act of Council shall have been previously ‘made in that behalf; and any such contract, obligation, agreement or engagement made or entered into without such Act of

Requisite
preliminaries.

²²⁴ Cr. 1.11.15; Aberdeen Old College v. Town, 1669, M. 2533, 6848; St. 2. 1.8-20; Bankt. 2.1.8-24. In Maxwell v. Glasgow Coll., 1745, M. 15744, Elchies,

Teinds, No. 19, the lease was probably not granted by the college.

²²⁵ Greig v. Miller, 1842, 4 D. 662.

²²⁶ Beck, 1836, 14 S. 1056.

' Council shall be void and null as against the common good of the burgh, or the succeeding magistrates or town council thereof, without prejudice nevertheless to the personal liability of the persons by whom the same may have been made or entered into.' The sixth section provides for a precedent Act of Council, with the additional safeguard that notices shall be given during Session of the Court of Exchequer (now the Court of Session) so as to give opportunity for interdict, but this section only applies to feus and alienations. It is submitted that the eleventh section is wide enough to include leases; but that the careful exclusion of leases from the purview of the sixth section absolves the burgh from any limitation as to the time at which notices require to be given.²²⁷ But even although the application of this statute could be held to be doubtful, a previous Act of Council seems to be requisite at common law;²²⁸ and according to the practice of the more important burghs, Acts of Council are passed, which are narrated in the lease. To render the lease secure, the Act of Council should set forth the consideration, for leases and alienations are governed by a common rule. Although a reduction of a lease granted by magistrates, on the ground that burghs are to be deemed upon the same footing as minors are, was repelled,²²⁹ yet leases, if granted without an adequate consideration, are reducible at the instance of the succeeding magistrates (contrary to one decision),²³⁰ of the burgesses, or of any person who can show an interest.²³¹

Mode of
letting.

The ancient and ordinary,²³² though perhaps not uniform,²³³ practice of letting by public roup, has now been made a statutory requisite under the pains of nullity by the fifth and eighth sections of the Act of 1822 quoted above,²³⁴ with regard to leases for more than a year of heritable property being part of the common good and to leases of the common good itself. It is

²²⁷ Greig v. Miller, *supra*, 225.

²²⁸ See Dean v. Mags. of Irvine, 1752, M. 2522; M'Dowal v. Mags. of Glasgow, 1768, M. 2525; Mags. of Selkirk v. Clapperton, 1828, 6 S. 955.

²²⁹ Archbishop of St. Andrews v. Mags. of Glasgow, 1685, M. 2496.

²³⁰ Id.

²³¹ Bankt. 1.3.73; Ersk. 1.4.23; Mags. of Glasgow v. Barns, 1685, M. 2515; Mags. of Edin. v. Paterson, 1690, M. 2496; Anderson v. Mags. of Renfrew, 1752, M. 2539; Dean v. Mags. of Irvine, *supra*, 228; M'Dowal v. Mags. of Glasgow, *supra*, 228; Wilson v. Storry, 1775, M.

2529; Stirling Burgesses v. Mags., 1772, 5 B.S. 419; Cleghorn v. Dempster, 1813, 2 Dow 40; Burgesses of Inverury v. Mags. of the Burgh, 14 Dec. 1820, F.C. p. 218; Mags. of Selkirk v. Clapperton, *supra*, 228; Sanderson v. Musselburgh Trs., 1859, 22 D. 24; cf. Nicol v. Mags. of Aberdeen, 1870, 9 M. 306, and Morrison v. Fleshers of Edin., 1853, 16 D. 86.

²³² 1593, c. 185; Mack. Obs. 106; Jack v. Stirling, 1681, M. 1838, 2496.

²³³ M'Ghie v. Edinburgh Mags., 1735, M. 2501; Bankt. 2.9.19.

²³⁴ *Supra*, p. 33.

probably implied that leases for a shorter period or of other subjects may be granted otherwise than by public roup.

The Act 1491, c. 36, which limited the duration of leases of the *rents* of a burgh's heritable property—now obsolete in practice—to three years, does not apply to leases of the heritable property itself.²³⁵ So that leases of such endurance as is ordinary in administration and beneficial to the burgh may be granted, and ratification by the Convention of Burghs, which was at one time supposed to be necessary,²³⁶ is not now required.²³⁷ But in all cases there should be strict conformity with the rules of the Act of 1822. The taking of a grassum, not being an act of ordinary administration, is probably inadmissible.²³⁸ But the old Act 1593, c. 185, has been respected in practice, so far as regards the letting of the burgh dues, as a part of the common 'gude and patrimony' which is to be 'yearly bestowed.'²³⁹

(β) *Parliamentary, not being Royal, Burghs.*

The Act 3 & 4 Will. IV. c. 77 (1833), in its thirtieth section, enacts that the magistrates and town council to be elected under the authority of the Act 'shall have such and the like rights, powers, authorities, and jurisdiction, as is or are possessed by the magistrates and council of any royal burgh in Scotland,' under certain exceptions and restrictions relative to civil and criminal jurisdiction. The question has never been decided whether the right to lease out, which is granted in these general terms, is or is not to be exercised under the rules and limitations applied to burghs royal by the Act of 1822. It would probably be held that as a negative reply would involve a grant of much more extensive rights and powers than burghs royal possess, this cannot have been the intention of the legislature.

(γ) *Burghs of Regality and Barony.*

The magistrates of a BURGH OF REGALITY or of BARONY have the same power with the magistrates of a royal burgh of granting feus of the common good,²⁴⁰ and consequently of granting leases. Grants by these communities are governed by the rules of common law alone, in other words, of good administration, since

²³⁵ Dean v. Irvine Mags., *supra*, ²²⁸; cf. M'Dowal v. Glasgow Mags., *ibid.*; and Mack. Obs. p. 106; Bankt. 2.9.16; Ersk. 2.3.15.

²³⁶ Hope Min. Prac. 9.16, note; Edinburgh Mags. v. Paterson, 1690, M. 2496 (feus).

²³⁷ Dean; M'Dowal, *supra*, ²²⁸.

²³⁸ But see cases referred to in E. Wemyss v. Murray, 17 Nov. 1815,

F.C. at p. 15, and relative Sess. Papers, p. 61.

²³⁹ Mack. Obs. 106; but see M'Ghie v. Edinburgh Mags., ²³³.

²⁴⁰ Cathie v. Mags. of Musselburgh, 1752, M. 2521, Elch. Burgh-Royal, No. 32; Mags. of Kilmarnock v. Inhabitants, 1776, Hailes 738, 5 B.S. 406; Wilson v. Storry, 1775, M. 2529; Stewart v. Paisley Mags., 1822, 1 S. 261 (N.E. 246).

Let should be
preceded by
Act of Council.

the above statutory provisions relative to the powers of administration do not apply to them.²⁴¹ The statutes specially applicable to burghs of regality have no reference to the powers of administration.²⁴² It will be prudent for a lessee to obtain a previous Act of Council. But it cannot be affirmed that such a warrant is indispensable. In a case already cited,²⁴³ this was one of the points adverted to in the opinions given, but the interlocutor proceeded on the want of an adequate consideration. In a subsequent case, the other point was taken, that alienation of public property should only take place by public roup, but as the transaction—a sale—was otherwise invalid, no decision was come to as to the mode of alienation.²⁴⁴ The magistrates should always bear in mind any uses which the inhabitants may have been in the custom of taking when considering whether all or what items of burgh property should be leased out.²⁴⁵

(c) *Miscellaneous Corporations.*—Improvement Commissioners created by local Acts have powers of leasing as therein set forth. The local authority, under the Artisans' and Labourers' Dwellings Acts, 1868 to 1885, may let lands acquired by it in like manner as other lands acquired for sanitary purposes and not needful therefor.²⁴⁶ The local authority under the Artisans' and Labourers' Dwellings Improvement (Scotland) Acts, 1875 to 1885,²⁴⁷ may let the land acquired by it, on condition that the lessees shall carry the improvement scheme into execution by building subject to suitable sanitary conditions.²⁴⁸ Industrial and provident societies, now regulated by Acts passed in 1876, 1880, and 1883,²⁴⁹ are on registration declared to be bodies corporate, with their property vested, not as formerly in trustees but in the societies themselves, which may then (unless their rules otherwise direct), take land on lease and lease out land. In the latter case the tenant is not bound to inquire as to the authority of the grantor, and the society's receipt for rent is to be a full discharge.²⁵⁰

²⁴¹ It. Cam. c. 1; 1491, c. 36; 1535, c. 26; 1593, c. 185; 1693, c. 28; 3 Geo. IV. c. 91; St. 4.1.3; Bankt. 4.20.10; Ersk. 1.4.38.

²⁴² 1606, c. 16; 1698, c. 19 and 20; 20 Geo. II. c. 43, sect. 26; 35 Geo. III. c. 122; Proc. Fisc. of Gorbals v. Macarthur, 1775, M. 7381, 5 B.S. 494; Begbie v. Brown, 1776, M. 7709; Dowie v. Douglas, 30th May 1817, F.C. p. 343, aff. 1 S. App. 125.

²⁴³ Mags. of Selkirk v. Clapperton, 1828, 6 S. 955.

²⁴⁴ Stewart v. Mags. of Paisley, *sup.* ²⁴⁰.

²⁴⁵ Kilmarnock Mags., *supra*, ²⁴⁰.

²⁴⁶ 42 & 43 Vict. c. 64, sect. 10.

²⁴⁷ 38 & 39 Vict. c. 49; 43 Vict. c. 2.

²⁴⁸ 38 & 39 Vict. c. 49, sect. 9. The Working Class Dwelling-houses Act, 18 & 19 Vict. c. 88, which attempted to introduce an anomalous amalgam of feudal and leasehold tenure, has been a dead-letter and need not be further noticed here.

²⁴⁹ 39 & 40 Vict. c. 45; 43 Vict. c. 14, sect. 8; 46 and 47 Vict. c. 47.

²⁵⁰ Act 1876, sects. 11, 12.

(2) *As Lessees.*

Lastly, corporations may become lessees, subject to the rules of good administration and to statutory limitations, if any such exist, and to the ordinary rules relating to the mode and degree in which they are represented by, and bound by acts of, their officers.

4. TRUSTEES.

(a) *As Lessors.*—The management of heritable property in *Trusts*. Scotland is to a very large extent in the hands of trustees, who act either under purely private trusts for private beneficiaries, or under public or semi-public trusts instituted for the benefit of a large number of persons, or of an extensive class, or of the public generally. In nearly all such trusts the office is gratuitous in the sense of the *Trusts' Acts* of 1861, 1863, and 1867;²⁵¹ that is, 'trustees who are not entitled as such to remuneration for their services in addition to any benefit they may be entitled to under the trust, or who hold the office *ex officio*,' including 'all trustees, whether original or assumed, who are entitled to receive any legacy, or annuity, or bequest under the trust.'²⁵² They stand thus in a different position from commissioners or factors in the ordinary case.

At common law trustees under private trusts are entitled, so *Private trusts*. far as not controlled by express limitations in the trust-deed, to grant leases for the ordinary term of endurance—that being an ordinary or necessary act of administration²⁵³—not subject to defeasance on their term of office coming to an end sooner than the stipulated term of the lease.²⁵⁴ But the power can only be exercised in aid of the intentions of the truster, or, as it is put by Lord Watson in the case just cited,²⁵⁵ 'Trustees have been permitted to use all those administrative powers and faculties which are necessary to the extrication and fulfilment of the purposes of the trust-deed, but not to use administrative rights and powers which instead of giving effect to and carrying out the purposes of the truster would tend to defeat or confuse those purposes as appearing from the deed itself.' Thus, it may be a fair, and even a highly expedient act of administration, to allow the husband of a beneficiary to occupy the trust premises rent free, as

²⁵¹ 24 & 25 Vict. c. 84; 26 & 27 Vict. c. 115; 30 and 31 Vict. c. 97. By 47 & 48 Vict. c. 63, sect. 2, these Acts may be held to be extended to all trusts.

²⁵² See Mackenzie, 1872, 10 M. 749; Alison, 1886, 23 Sc.L.R. 362.

²⁵³ M'Laren on Wills, 242.

²⁵⁴ Wardlaw v. Campbell, 1882, 9 R. 725, aff. 10 R.H.L. 65; 8 App. Cas. 641.

²⁵⁵ At 10 R.H.L. 69; 8 App. Cas. 651.

perhaps the best means of enabling him to carry on a trade for the support of his wife and family, though the object of the trust be to protect the wife's interest from the *jus mariti*.²⁵⁶ The Court will refuse to grant special powers to testamentary trustees in supplement to those conferred on them by the settlement, unless the application comes within the statutory rules mentioned below.²⁵⁷

Public trusts.

Of public trusts, mortifications alone have furnished illustrations of the powers of trustees in the matter of leasing. Craig²⁵⁸ was of opinion that in the absence of powers specially granted (as is sometimes the case)²⁵⁹ in the constitutive deed, the limit of duration is twenty-one years or three lives; having probably in contemplation leases of agricultural land. This opinion does, therefore, nothing more than put in a concrete form adapted to that case, as understood at the time, the rule requiring of all trustees to proceed on the footing of good administration and for the benefit of the trust. In a case which was much debated, it never seems to have been questioned that trustees on a mortification could let for a term of years, the only doubt being whether there was an inversion of the trust by turning the building in which the beneficiaries were being taught an industry, from a woollen into a linen manufactory.²⁶⁰ But where there is an express prohibition in the mortification against selling or disposing of part of the property, the trustees are not entitled, at their own hand, to let it for ninety-nine years, however advantageous the terms may be.²⁶¹ Acts of mal-administration may be challenged in Court by any one who has a legal interest (either present or contingent) to benefit by the institution;²⁶² by any administrator;²⁶³ and perhaps by the Presbytery of the bounds.²⁶⁴

Statutory powers.

By statute, there are granted, in the first place, to various bodies acting through trustees—such as Friendly Societies²⁶⁵—

²⁵⁶ *Kay v. Miln*, 1830, 8 S. 437.

²⁵⁷ *Berwick*, 1874, 2 R. 90 (renunciation of lease); *Kinloch*, 1859, 22 D. 174.

²⁵⁸ Cr. 1.11.5.

²⁵⁹ *Dallas, Styles*, 833, 840.

²⁶⁰ *Edinburgh Town v. Binny*, 1694. M. 9107; *English Rules in Lewin*, p. 542; 2 M'L. on Wills, 392; and see *Mack. Obs.* 369, and *Elgin Mags. v. Morrison*, 1882, 10 R. 342.

²⁶¹ *Petrie's Trs. v. Ramsay*, 1868, 7 M. 64.

²⁶² Arg. from *Edinburgh Merchant Co.*

v. Heriot's Hosp., 1765, M. 5750; *Christie v. Stirling Mags.*, 1774, M. 5755; *Bow v. Stirling Mags.*, 1825, 4 S. 276 (N.E. 280); *Ross v. Heriot's Hosp.*, 1843, 5 D. 589, rev. 5 B. Ap. 37; and see *Downie*, 1879, 6 R. 1013.

²⁶³ *Macausland v. Montgomery*, 1793, M. 2010.

²⁶⁴ See *Perth Mags. v. Black*, 1730, 1 Pat. 39; *E. Roxburghe v. Maisondieu Tenants*, 1650, 1 B.S. 461.

²⁶⁵ 38 & 39 Vict. c. 60, sect. 16 (2).

general powers of granting and taking leases, in the Acts which specially regulate the proceedings of the bodies. To these it seems unnecessary to advert further than by suggesting that in every case the Statutes themselves should be consulted. But now also, in the second place, general powers are conferred on all gratuitous trustees²⁶⁶—whether in public or private trusts—by the Trusts Act of 1867 :²⁶⁷

‘In all such trusts, the trustees shall have power to do the following acts, where such acts are not at variance with the terms or purposes of the trust, and such acts, when done, shall be as effectual as if such powers had been contained in the trust-deed,—viz. (*inter alia*), to grant leases of the heritable estate of a duration not exceeding twenty-one years for agricultural lands, and thirty-one years for minerals, and to remove tenants’ (sect. 2). Further, ‘it shall be competent to the Court of Session, on petition of the trustees under any trust-deed, to grant authority to the trustees to do any of the following acts on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof; and the Court shall determine all questions of expenses in relation to such applications, and where it shall be of opinion that the expense of any such application should not be charged against the trust-estate, it shall so find in disposing of the application;’ (*inter alia*) ‘to grant feus or long leases of the heritable estate or any part of it’ (sect. 3).

Ordinary powers.
Special powers.

The application goes to a Lord Ordinary in the Outer House or on the Bills, and proceeds as a petition under the Distribution of Business Act of 1857,²⁶⁸ with the like opportunity for review (sect. 16). But

‘nothing in this Act contained shall be construed as innovating, revoking, or restricting any express powers or directions given to trustees acting under any trust-deed, . . . and none of the powers and incidents by this Act conferred or annexed to the office of trustee shall take effect or be exercised if it is declared in the trust-deeds that they shall not take effect; and, when there is no such declaration, then if any variations or limitations of any of the powers or incidents by the Act conferred or annexed are contained in such trust-deed, such powers or incidents shall take effect or be exercised only subject to such variations or limitations’ (sect. 19).

Saving clause.

It may be regarded as settled that the effect of the first of these sections—applicable to what may be called leases of ordinary administration—is not to give to trustees any new

Interpretation of these provisions.

²⁶⁶ But see note ²⁵¹.

²⁶⁸ 20 & 21 Vict. c. 56.

²⁶⁷ 30 & 31 Vict. c. 97.

power of leasing where they had it not before, but to enable trustees, who had, either at common law or under the trust-deed, power to lease, to do so for the periods mentioned in the Act. It did not, therefore, enable trustees to lease out an unopened mineral field, where the trust-deed contained no such power.²⁶⁹ In regard to the following section—which authorises the Court to sanction long leases—an opinion (apparently well-founded) has been expressed that such sanction could not be given to a lease for ninety-nine years of a building (not merely a building-stance) where the intention of the truster was that the subjects should remain unlet.²⁷⁰ But there was no inconsistency with the truster's intention—such as to exclude the Court's sanction—where the trustees proposed to grant an obviously advantageous lease for 999 years of part of an estate, and the trust-deed only directed that after the lapse of a liferent the trustees were to enter into possession, divide and pay over the proceeds half-yearly till the death of the truster's last-surviving child, and then to sell and divide the price among his grandchildren.²⁷¹

Auctor in rem suam.

These powers of trustees to grant leases are in every case subject to the general rule of law that they are not entitled to be *auctores in rem suam*—to make profit by their office—as by taking *quā* individuals, leases granted by themselves, directly or indirectly, *quā* trustees; and that if such profit has been made, the lease must be held to have been taken by them for behoof of the beneficiaries, as subject of a constructive trust.²⁷²

Trustees as lessees.

(*b*) *As Lessees*.—This rule is also one of the few matters requiring special mention in regard to the powers of trustees to take leases in their fiduciary capacity. It will depend on special circumstances in each case, whether they are justified in binding the trust-estate by taking a lease at all, or by taking a lease for years few or many, and it would be out of place to attempt to give illustrations by means of hypothetical cases, which could only lead up to the rule that trustees are entitled and bound to do what they can for the benefit of the estate, within the limits set by the intention of the truster, and by the rules of necessary or ordinary

²⁶⁹ *Wardlaw v. Campbell*, *supra*,²⁵⁴. (The point did not require to be determined, but the great preponderance of opinion was to this effect). See *Downie*, 1879, 6 R. 1013.

²⁷⁰ *Petrie's Trs.*, *supra*,²⁶¹, *per* L.J.-C. *Patton*; cf. *Hay's Trs. v. Miln*, 1873,

11 M. 694 (sale); *Anderson*, 1876, 3 R. 639 (feu), with *Weir's Trs.*, 1877, 4 R. 876; *Jameson*, 1884, 21 Sc.L.R. 541.

²⁷¹ *Birkmyre*, 1881, 8 R. 477.

²⁷² See the authorities in *M'Laren on Wills*, ii. 112; *Lewin*, p. 180.

administration. But it is possible and useful to illustrate the rule of constructive trust,—as has been already done in treating of tutors and judicial factors²⁷³—from actual cases of renewals of lease. Thus, a factor to a landowner's tutor (holding in that way a fiduciary relation to the pupil), in acquiring a lease of the teinds of the pupil's lands, was held bound to communicate the benefit of the lease to the pupil.²⁷⁴ A still stronger illustration of the rule is given by a case in which a lease from a liferenter was, on the death of the tenant, taken up by his widow and continued by her in her own name, at first by simple entry of her name in the landlord's rent-roll, and later under an agreement for an advance of rent; and yet it was held that the tack had belonged to her daughters as heirs-portioners of their father, and her representatives had to account for the profits.²⁷⁵ For like reasons, if a lease be taken by members of a copartnery or by trustees for the partnership, no partner or trustee can by effecting a dissolution of the partnership, or taking advantage of its natural termination a short period before, secure to himself the benefit of a renewal of the lease in his own favour. The lease, if renewed, accrues to the copartnery.²⁷⁶

5. FACTORS, &C.

The powers of commissioners, factors, and other mandataries depend wholly on the scope of their mandates—which ought to be in writing²⁷⁷—as gathered from the deed itself,²⁷⁸ or by necessary implication in conformity with the general rules of agency.²⁷⁹ Thus, a commission to 'input and output' tenants empowers the commissioner to let, and there is no implied restriction to leases for a year only;²⁸⁰ but power to 'output' relates only to removings. In the old law a factor could not without express powers grant a rental right.²⁸¹ The duration of leases so granted is not limited by the endurance of the factory.²⁸² The power to grant or take leases falls of course with the factory when recalled or

Constructive trust.

Commissioners, factors, mandataries.

²⁷³ *Supra*, p. 14, and cases of *Wilsons v. Wilson*, 1789, M. 16376; *Parkhill v. Chalmers*, 1771, M. 16365, aff. 2 Pat. 291.

²⁷⁴ *Ludquhairn v. Haddo*, 1632, M. 9503.

²⁷⁵ *Bee v. Wallace's Exrs.*, 1745, M. 6008. As to proof of trust, see *Seth v. Hain*, 1855, 17 D. 1117; and as to the protection of onerous assignees from the trustees, 2 M'L. on Wills, 115.

²⁷⁶ 2 B.C. 632; *Lindley on Partnership*,

p. 574; *Featherstonehaugh v. Fenwick*, 17 Ves. Jun. 298.

²⁷⁷ Cr. 1.7.4; see St. 2.9.3; *Ersk.* 2.6.21.

²⁷⁸ See the styles in *Spots*, 302; *Dallas*, 812; 2 Jur. Styles, 37.

²⁷⁹ See *Haldane v. Nichol*, 1863, 36 Sc. Jur. 78.

²⁸⁰ 1 Hunter, 180; *contra*, 1 Bell, Leases, 133.

²⁸¹ St. 2.9.17; *Bankt.* 2.9.41.

²⁸² *Ersk.* 2.6.21; *contra*, Cr. 2.10.1.

otherwise terminated, but care should be taken to give due notice to all concerned.²⁸³ A factor having general power to grant a lease is entitled to modify its terms.²⁸⁴

²⁸³ Heddrington *v.* Book, 1724, M.
4047.

²⁸⁴ Grant *v.* Sinclair, 1861, 23 D.
796.

CHAPTER II.

LIMITATION OF TITLE.

THERE may be an incapacity to grant an effectual lease, arising from limitation or lack of title in any one of three different ways: by want of a properly completed title; by the diligence of, or by conveyance to, creditors; and by the co-existence of a conjunct or correlative title.

I.—WANT OF INFESTMENT.

‘The proper title of the granter of a lease as heritable proprietor is an infestment. Where the granter is not infest, the lease does not confer an effectual or permanent right, though it may be made perfect by the granter’s subsequent infestment, provided no mid-impediment has intervened.’¹ Since 1st October 1874, the status of apparency has ceased to be part of our law;² but this rule holds good whether the heritable proprietor have the personal right which accrues to him by mere survivorship under the Conveyancing Act of 1874;³ or hold a personal service;⁴ or hold a special service, or adjudication, or disposition, judicial or private, without infestment. The mid-impediment which will avail to cut down a lease granted by a person in such a position, may be an infestment taken by an heir of entail, who does not represent the granter; by the holder of the fee at the termination of the granter’s liferent;⁵ by a purchaser from a former owner infest; or by a creditor of a former owner infest adjudging his debtor’s estate.⁶ But where the person taking infestment represents in any way the uninfest granter, he

Want of
infestment.¹ B. Pr. 1181.² 37 & 38 Vict. c. 94, sect. 9; M’Adam v. M’Adam, 1879, 6 R. 1256; Fleming’s Trs. v. Fleming’s Tutors, 1882, 9 R. 1013; Main v. Lamb, 1880, 7 R. 688.³ Sect. 9.⁴ See *ibid.* sect. 31.⁵ Gordon v. Milne, 1780, M. 7008, 10309 (liferent by reservation).⁶ B. Pr. *supra*, ¹; Lowdon v. Murray, 1752, M. 5270.

is not entitled to challenge the lease on the mere head of incomplete title in the granter.⁷

Similarly, if the lessor's title (though at the date of the lease unimpeached and unimpeachable) be reduced,⁸ or, if it never was more than inchoate and eventually was never completed, the lessee's right will fall with it. Of the latter state of facts, there is an apt modern illustration. After missives of sale of lands, the purchaser entered into missives of lease of the minerals. The sale fell through, and a second purchaser obtained from the vendor a disposition containing an assignation by the first purchaser of the missives of lease. The lessees were held not bound, since the lessor never owned the minerals; the purchaser never agreed to let them; and the two elements of contract and title could not be combined without the consent of the lessees.⁹

II. CONVEYANCE TO AND DILIGENCE BY CREDITORS.

(a) *Of Lessor.*

1. *Bond and Disposition in Security.*

The modern bond and disposition in security leaves powers of ordinary administration unimpaired in the debtor.¹⁰ But the clause of assignation of rents, in default of payment of the debt, entitles the creditor to enter into possession and uplift the rents, and to make all necessary repairs on the buildings, subject to accounting to the debtor for any balance of rents actually recovered beyond the debt, interest, penalty, and expenses. Possession is obtained by the lender by means of an action of mailles and duties, which operates as an additional transference of the landlord's rights, the publication of his sasine by registration being insufficient to put the tenants *in malâ fide* to pay to their landlord, whose right is only encumbered, not taken away. So that a heritable creditor in possession can grant leases so long and for such time as he is in possession,¹¹ and to this extent (but no further) Mr. Duff is justified in saying that he may set tacks, whether to the debtor or others, and remove tenants.¹² The passage on which Mr. Duff founds the more

⁷ This was even the case under the old law of apperency, as altered by the Act 1695, c. 24, after three years' possession, leases being onerous deeds. Killilung Tenants, 1760, 5 B.S. 877; Knox v. Irvine, 1759, M. 5276; Keay v. Marquis, 1804, Hume 434.

⁸ Macniven v. Murray, 1847, 9 D. 1138.

⁹ Weir v. Dunlop & Co., 1861, 23 D. 1293 (correct the rubric).

¹⁰ 1 Jur. Styles, p. 401 (5th ed.); 32 & 33 Vict. c. 116, sects. 6, 7; and Sched. FF. to 31 & 32 Vict. c. 101.

¹¹ 2 Bell's Conv. 1077.

¹² Duff, Feudal Conv. pp. 274 and 276.

extensive power is only an observation from the Bench that an heritable creditor on entering into possession is to be viewed as the proprietor, leading up to the doubtful doctrine that it would therefore be unreasonable to allow a charge in name of factor-fee, or for any trouble undertaken in that capacity.¹³

In a case where an heritable creditor infert on a bond and disposition in security, containing power to output and input tenants, had obtained a decree in an action of mailles and duties, and levied the rents under it, no doubt was felt that he was entitled, on the ground of the special power, to pursue a summary process of removing,¹⁴ and the only questions (which did not require decision) were, whether, in such a case, decree of mailles and duties was necessary, and whether the power extended to granting leases of ordinary duration.

In a case finally decided on specialties, the Lord Ordinary (Rutherford) decided that an heritable creditor was not entitled to enter into possession to the effect of ousting the proprietor himself, and letting the lands as if they had been conveyed to him with a proper term of entry and an obligation by the disponent to remove, his only remedies being action of mailles and duties, sale, and poiding of the ground.¹⁵ He cannot do so by a summary removing before the sheriff though he have special powers to 'output possessors.'¹⁶

Special power
to creditor to
sue removing.

Not to oust
the debtor.

2. *Absolute Disposition with Back-bond.*

The form of security known as absolute disposition with back-bond or back-letter has very different effects. It confers a right of property, completed by infertment and qualified only by a personal obligation of the disponent to denude in a certain event. It entitles the disponent to administer the property, and *inter alia* to grant leases on such conditions and for such duration as he pleases, so long at least as they are not fraudulently conceived. But if, as is ordinarily the case, the disponent is, either by express stipulation in the back-letter or by tacit understanding, left in full possession and control of the subjects, neither the disponent nor his trustee in bankruptcy or other representative can object to leases granted by their debtor, *in bonâ fide*, in course of ordinary administration, and not having the character of alienations in the narrower sense of the word.¹⁷

Creditor in
possession,

Or not.

¹³ Crs. of Kildonan v. Douglas, Heron & Co., 1785, M. 14135; see 2 Bell's Conv. 1076.

¹⁴ Forsyth v. Aird, 1853, 16 D. 197.

¹⁵ Blair v. Galloway, 1853, 16 D. 291. Mitchell v. Little, 1820, Hume 661,

probably proceeded on fraud.

¹⁶ M'Farlane v. Campbell, 4th March 1857, 19 D. 623.

¹⁷ Abbot v. Mitchell, 1870, 8 M. 791; B. Pr. 912, and cases there.

3. *Inhibition.*

Inhibition.

'Inhibition does not deprive a debtor of the management of his lands. It therefore does not affect a tack of them though granted after the inhibition, if it is a fair and honest tack for an adequate rent and an ordinary term of years. But it is otherwise with regard to any tack of an opposite description, such as impairs the inhibiting creditor's security and lessens the value of the debtor's lands if they shall be adjudged or brought to a judicial sale.'¹⁸ Where the lease was of a duration longer than ordinary, stipulated for a rent very inadequate, anticipated the ish of a current tack, and contained such a power to cut ripe copsewood as was usually in the right of a proprietor only, it was ruled that 'the said tack is such a species of alienation as to be struck at by the pursuer's inhibition.'¹⁹ And a lease granted in consideration of a sum of money advanced in name of grassum, and of a certain rent, for repayment of which the tenant was allowed to retain the whole of the rent, was found to be affected by inhibition, being not a proper administrative lease, but an attempt to obtain in the form of a lease a security for debt which a creditor could not have obtained directly by the voluntary act of the debtor or by legal diligence.²⁰ Inhibitions now take effect from the date of the registration of a statutory notice in the register of inhibitions, or failing that, from registration of the inhibition itself and the execution thereof.²¹

4. *Adjudication.*

The effect of adjudication upon powers of leasing depends upon the doctrine of litigiosity. Litigiosity which used to take effect from citation upon a summons of adjudication as being equivalent to denunciation upon the old letters of apprising²² now begins with the registration of a statutory notice of the summons in the register of adjudications.²³ It is no defence that the lessee, whose right began after litigiosity supervened, was another creditor;²⁴ or that the sum adjudged for was small;²⁵ or

¹⁸ *Per* Baron Hume in *E. of Breadalbane v. M'Lauchlan*, 1802, Decis. 242; and see 2 B.C. 151; *Ersk.* 2.11.2, and Note (by Ivory) 318; *St.* 2.9.43, art. 1, Note (by Brodie); *More's Notes*, 425; *B.1r.* 1185; *Bandeane v. Ballegerno*, 1603, M. 7016; *Gordon v. Milne*, 1780, M. 7008.

¹⁹ *E. Breadalbane v. M'Lauchlan*, ¹⁸

²⁰ *Wedgwood v. Catto*, 13th Nov. 1817, F.C. p. 386.

²¹ 31 & 32 Vict. c. 101, sect. 155.

²² *Ersk.* 2.12.16 and 41; *Kames, Equity*, 445; 1692, c. 19; *Mack. Obs.* p. 450; *L. Cardross v. Colville*, 1682, M. 77; *Crichton v. Anderson*, 1684, M. 79.

²³ 31 & 32 Vict. c. 101, sect. 159.

²⁴ *A. v. B.*, 1629, M. 8375. In 1 Fol. Dic. 557, the word 'selling' is used in place of 'setting.'

²⁵ *Gardin*, 1627, M. 8375.

that the landlord was under no other diligence at the time.²⁶ The date to be looked to in judging of a competing tenant's preference is the date of his entry into possession.²⁷ And the adjudication, in order to have full effect, must be timeously and lawfully followed forth.²⁸

An adjudger cannot grant a lease to endure beyond the term of his own right.

5. *Ranking and Sale.*

The rules in regard to the granting of leases by a landlord pending a process of ranking and sale of his estate (now nearly obsolete) may be gathered from a collation of the cases.²⁹

6. *Insolvency or Bankruptcy.*

Insolvency, or even bankruptcy, does not abrogate the power of the proprietor to grant a lease; and a bankrupt landlord, if the trustee in his sequestration declines to make up a title or to interfere in any way with the subjects, is entitled at the expiration of the lease to bring an action of removing.³⁰

But the insolvency or bankruptcy of a lessor may, under the Statutes 1621, c. 18, and 1696, c. 5, raise questions relative to the validity of leases. The insolvency of the landlord is not a ground for cutting down his leases, but if the lessee be a conjunct or confident person, and the deed be granted without a true, just, and necessary cause, to the prejudice of prior creditors, and the granter be insolvent and was so at the time of making the deed, it is reducible.³¹ The second branch of the earlier statute, is also applicable, which authorises the reduction of all voluntary deeds granted by an insolvent to persons cognisant of his insolvency, after such diligence shall have begun as law has appointed for attachment of the subject conveyed.³² But bankruptcy does not render invalid a lease just and fair in itself, and not coming under the operation of the Act 1696, c. 5, as altered by the Sequestration Statute, 1856, sect. 7, and the Debtors' Act, 1880 (43 & 44 Vict. c. 34), sect. 6. The generality of the terms of the leading statute includes leases. If, therefore, a lease

Bankrupt may grant leases.

Effect of insolvency or bankruptcy on validity of leases.

²⁶ Blackburn v. Gibson, 1629, M. 8378.

²⁷ Wallace v. Harvie, 1627, M. 67 and 15228; Maxwell v. Tenants of Glasgow, 1630, M. 15215.

²⁸ Blackburn, *supra*, ²⁶; Crichton v. Anderson, 1684, M. 79.

²⁹ Carlyle v. Lowther, 1766, M. 8380; York Buildings v. Fordyce, &c., 1778, M. 8380; aff. 2 Pat. 500; York Build-

ings v. Threipland, 1778, M. 8383; rev. 2 Pat. 496; Campbell v. Siller, 1785, M. 15223; Lord Cranstoun's Crs. v. Scott, 1756, M. 15218; Stewart v. M'Ra, and Stewart v. Campbell, 1834, 13 S. 4, 7.

³⁰ King v. Wieland, 1858, 20 D. 960. The rule would extend to extraordinary removings.

³¹ 2 B.C. 186; Goudy, 44.

³² 2 B.C. 199; Goudy, 58.

should be granted subject to the statutory objections, it is reducible.³³

Sequestration. In the sequestration of a landlord's estate it may happen that an immediate sale of the bankrupt's property would be attended with great loss; or it may be impracticable to sell it at all to advantage, and therefore it may become necessary to adopt a course of management. If the creditors resolve to take up the heritable property, the power of leasing, under the rules ordinarily applicable to administrators, necessarily belongs to the trustee. In particular, he must have the power, upon the expiration of a current lease, to grant a new lease, as this may be necessary towards an advantageous sale. As the administrator of the estate, and the organ of the body of creditors, the act of the trustee as a lessor will bind the creditors. But, although not indispensable, it may be right for the lessee to obtain the consent of the commissioners.

Trustee's liability.

A trustee in a sequestration who takes possession of the bankrupt's heritable estate renders himself liable in implement of the prestations due under the lease by the landlord to the tenant in occupation of the land, at least to the extent of the rents received by him as trustee from the estate.³⁴ And he will be bound by an agreement made by the landlord in the fair administration of the property, such as an agreement for an abatement of rent.³⁵

(b) *Of Lessee.*

Attachment of power to transmit.

A lessee's power to sublet or assign, if such be vested in him may be affected by inhibition, adjudication, or sequestration.³⁶ An inhibition has no effect against a renunciation, if the renunciation is only a recognition by the tenant that the lease has by law or compact come to an end. If the lease excludes assignees and sublessees, inhibition does not secure it to the inhibiting creditor, nor compel the lessee to put in a manager.³⁷

Adjudication.

Adjudication is the active diligence appropriate to all heritage, and therefore to the right of lessees. All leases are adjudgeable (even those which, being agricultural leases of ordinary endurance, are not assignable),³⁸ unless assignees are expressly excluded, or unless there be a special exclusion of adjudgers or other

³³ 2 B.C. 108-10; Goudy, 85.

³⁴ Harvie v. Haldane, 1833, 11 S. 872.

³⁵ Lindsay v. Webster, 1841, 4 D. 231.

³⁶ The right to a lease cannot be affected by heritable bond, that being a form of security only applicable to feudal estate—Grieve, &c. v. Grieve's Crs., 1790,

Hume 778. The mode of rendering long leases effectual as security for debt is described *infra*, chap. ix.

³⁷ Fraser v. M. of Abercorn, 1835, 14 S. 77.

³⁸ Mack, 2.6.7; Ersk. 2.8.8; 1 B.C. 77.

creditors. And if the exclusion of assignees contain an exception in favour of such as the landlord shall approve, the right to withhold approval, and therefore exclude adjudication, is absolute.³⁹ Lastly, an assignation or sublease may fall under the Bankruptcy Acts 1621, c. 18, and 1696, c. 5, in the same way as a lease by a proprietor.

III.—CO-EXISTENCE OF A CONJUNCT OR CORRELATIVE TITLE IN ANOTHER PARTY.

This sort of disability includes the cases of entail, fee and liferent, common property, and leasehold.

A. ENTAIL.

A strict entail is the only mode of restricting a fiar, who is in the sole possession as such of heritable property, in the enjoyment thereof, over and above the limitations of user which bind all proprietors through the law of neighbourhood. It may extend over all feudalizable subjects, whether held feu or burgage, buildings, teinds, salmon fishings, reversions, adjudications, the radical right remaining to a debtor after granting a trust-deed, and over *pro indiviso* shares of a feudal subject; but not over unfeudalizable subjects such as leases.⁴⁰ The heir of entail in possession is not a liferenter but a limited fiar, restrained by the fetters of the entail, but no further.

Subjects of entail.

It is now necessary to a strict entail that all the three cardinal prohibitions—necessary to keep the estate together and in the line of succession—should be present, properly fenced by irritancies and resolute clauses,⁴¹ either expressly in the deed of entail itself, or by means of the clause authorising registration of the deed in the register of tailzies, which is the modern equivalent.⁴² The only prohibition which it is necessary to notice here is that which strikes against alienations. For every lease is an alienation,⁴³ and the main interest of modern entail law lies in observing in what way, under what conditions, and how far the Court and the legislature have relaxed the strict law which

Restraint on alienation.

³⁹ D. of Buccleuch v. Elliot, 1747, M. 10329-35, Elch. Tack, No. 12, 5 B.S. 618, note; Hepburn v. Mossman, 5 B.S. 618; Cunninghame & Co. v. Hamilton, 1770, M. 10410, Hailes 369. (A vague doubt was suggested whether the landlord by himself adjudging might not let in other adjudgers within year and day, but see last case).

⁴⁰ Cases collected in Rankine, Landownership, p. 570.

⁴¹ 11 & 12 Vict. c. 36, sect. 43.

⁴² Ibid. sect. 39; 31 & 32 Vict. c. 101, sect. 14.

⁴³ Bontine v. Bontine, 1864, 2 M. 918, per L. Deas and Curriehill (I.); and per L. Chan. Eldon in 2 Dow 213.

created intolerable disabilities in the working of this prohibition and its fellows.

'Dispone,'—
'put away.'

It is necessary to premise that the outcome of an immense mass of legal disputation and philological research has been to establish as equivalents to the expression 'alienate,' as employed in one of the cardinal prohibitions; the other expressions frequently to be found therein, alone or in conjunction—viz., 'dispone,'⁴⁴ and 'put away' (*dilapidare*),⁴⁵ and that each of these expressions therefore strikes at leases.

Relaxations.

The relaxations which were necessary in order to reconcile the lawful wishes of the entailer with the plain interests of the community have proceeded along three lines.

In the entail
itself.

I. They were sometimes contained in the deed of entail itself. And then the rule in favour of the freedom of ownership opened the way to a construction as ample as the relaxing or empowering words would fairly bear. Thus, where there was a clause permitting leases in certain specified terms, or for such space of time as they (the heirs) should think fit, a lease for 999 years, with a grassum, was sustained, although it was argued that the permissive clause had reference exclusively to leases limited to those periods which in law did not amount to alienation.⁴⁶ There was a condition fixing a minimum rent; but so long as that condition was not broken, a grassum might be taken, without any obligation to invest it for behoof of the heirs in succession.⁴⁷ Where the only restriction was that it should not be lawful for the heir in possession 'to grant tacks or rentals of the same for any longer space than the granter's lifetime, at least not to set any tacks or rentals thereof in diminution of the rental, directly or indirectly, longer than the said space,' the Court was of opinion that the entire prohibition was contained in the words following 'at least.'⁴⁸ But a special restriction will not be read as a relaxation to the effect of liberating the heir in possession on account of its not being properly fenced, and of its being the only bar to liberty of leasing, provided the general prohibition against alienation be effectually guarded.⁴⁹

Long leases by
heir of entail
valid, unless
prohibited by
entail.

⁴⁴ D. of Queensberry's Exrs. v. D. Buccleuch, 7th March 1816, F.C. 105; rem. 5 Dow, 293; 5th Feb. 1818, F.C. 466; rev. 1 Bligh 339, 6 Pat. 465, 548, and authorities referred to in Sess. papers and appeal cases there; and Keay v. Marquis, 1804, Hume 434.

⁴⁵ Mordaunt v. Innes, 9th March 1819, F.C. 679; aff. 1 Sh. Ap. 169, and authorities there.

⁴⁶ 1 B.C. 68; Sandf. on Ent. 305-6; E. Elgin v. Wellwood, 1821, 1 S. App. 44.

⁴⁷ Wellwood v. Moncrieff, 1823, 2 S. 475 (N.E. 423).

⁴⁸ Keay v. Marquis, 1804, Hume 434.

⁴⁹ Anstruther v. Anstruther, 1840, 3 D. 142; aff. 2 Bell's App. 242 (19 years); see also Bontine v. Bontine, 1864, 2 M. 918 (two lifetimes, or 19 years + one lifetime).

II. Apart from statute, the Court has recognised—and all the cases which occupied so much of its time and of that of the House of Lords, about the end of last and the beginning of the present century, proceeded on the footing—that leases of ordinary administration, of the usual endurance and containing no stipulations framed for the purpose, or with the result, of giving the grantor a greater benefit than his successors, are valid, on the ground that they are not alienations in the narrower sense of the word, but contracts necessary for reaping the full fruits of the subject.⁵⁰ The determination of what is and what is not an ordinary lease depends to a large extent on the nature of the subject let. Most of the illustrations of the doctrine are, of course, drawn from agricultural leases. In treating of what may, by a convenient though somewhat inaccurate phrase, be called the common law powers, it will be necessary to refer to such statutory relaxations as amend the law without falling under the category of statutory powers.

Leases of ordinary administration.

What are such.

(1) First as to *duration*.

In one case, in which a lease for a thousand years was reduced as an alienation, the judgment affirming proceeded upon the ground that it went against a prohibition to let in diminution of the 'true worth and rental,' having been granted for a rent lower than that paid at the expiration of the previous lease; and it was therefore unnecessary to determine whether it was liable to reduction on any other ground.⁵¹ But its invalidity, by reason of duration alone, is undoubted, because leases for periods much shorter have, on that ground, been set aside as alienations. A lease of a portion of a loch for three hundred years was held invalid under a prohibition to dispense.⁵² A lease for a hundred years, although there is no case in point, has always been justly considered excessive.⁵³ Leases for ninety-nine years,⁵⁴ ninety-seven years,⁵⁵ seventy-six years and the lifetime of the tenant in possession at the expiration of that period,⁵⁶ seventy-seven

Leases of unusual duration.

⁵⁰ 1 B.C. 69; *E. Wemyss v. D. Queensberry's Exrs.*, 1822, 1 S. 483 (N.E. 449); *E. Cassilis v. M'Adam*, 1806, M. Tack, Appx. 14; Sandf. 301; More's Notes, 185.

⁵¹ *Turners v. Turner*, 1807, M. Tailzie, App. 16; aff. 1 Dow 423, 5 Pat. 758.

⁵² *Stirling v. Dunn*, 1827, 6 S. 272; aff. 3 W. and S. 462; cf. *Hamilton v. M'Dowal*, 3rd March 1815, F.C. 302.

⁵³ 1 B.C. 69; Sandf. on Ent. 294;

St. 2.3.59, Note (by Brodie), p. 271; *Kames' Eluc.* 358; ——— v. ———, 1752, 5 B.S. 797.

⁵⁴ *Malcolm v. Henderson*, 1807, M. Tailzie, App. 17; aff. 2 Dow 285.

⁵⁵ *D. of Queensberry v. E. Wemyss*, 1807, M. Tailzie, App. 15, Buch. Rem. Ca. 408; aff. 2 Dow, 90-124, 206-15; 5 Pat. 758.

⁵⁶ *Mordaunt v. Innes*, 9th March 1819, F.C. 679; aff. 1 S. App. 169.

years,⁵⁷ sixty-six years,⁵⁸ fifty-seven years,⁵⁹ forty years,⁶⁰ and thirty-one years have also been held invalid.⁶¹ In some of these cases the purpose of the lessor was further ascertained by the fact that he stipulated for a grassum.

Liferent leases. Though there is no decision on the subject, it may be regarded as certain that liferent leases are leases of unusual duration,⁶² since they are regarded in law as importing a right more permanent and more nearly approaching to property than leases of ordinary duration, and in common with leases of definite but unusual duration, imply, in the absence of an express prohibition, the power of assigning and subletting,⁶³ and fall under the liferent, not the single, escheat.⁶⁴

Invalid in toto, or quoad excessum? The question has never been determined whether a lease whose only blot is excessive duration be good for a period restricted to the ordinary endurance, or to the term allowed by the entail. In one case, the Court of Session refused to restrict on the ground that the lease was otherwise objectionable, and the House of Lords gave no opinion on the hypothetical question;⁶⁵ in another, the lease embraced the whole rights of ownership, except the right of voting as a freeholder;⁶⁶ and in a third case, there was a grassum.⁶⁷ The opinions of the best writers differ.⁶⁸ But aid may be obtained from the opinions of the Court in a case where the entail allowed of leases for twenty-five years—evidently the limit of leases of ordinary administration—and the heir granted a lease for ninety-nine years. The refusal of the Court to allow a restriction to the shorter period was founded on the fact that the object of the lease was to enable the lessee to erect a considerable building on a small piece of ground; in short, that it was a build-

⁵⁷ *Elliot v. Pott*, 10th March 1814, F.C. 588; rev. 1821, 1 S. App. 16, 89.

⁵⁸ *Turner v. Turners*, 6th Dec. 1811, F.C. 363.

⁵⁹ *E. Wemyss v. D. of Queensberry and Welsh*, 25th May 1813, F.C. 298; aff. 1 Bligh, 339; 6 Pat. 465, 551.

⁶⁰ *Malcolm v. Bardner*, 1823, 2 S. 410 (N.E. 366).

⁶¹ *Stirling v. Walker*, 20th Feb. 1821, F.C. 279.

⁶² *Balfour*, 203; 1 *Craig* x. 5; 2 *Ross' Lect.* 484.

⁶³ *St.* 2.9.26, Note vi. (by Brodie); *Mack.* 2.6.7; *Bankt.* 2.9.11, 46; *Ersk.* 2.6.32; 2 *Ross' Lect.* 484; 1 *B.C.* 77; *Sandf.* on Ent. 303; *Hume v. Craw*, 1637, M. 10371; *Duff v. Fowler*, 1672, M. 10282.

⁶⁴ *Hope's Min. Prac.* vii. 2.5, and

note to 5; *St.* 2.4.62, 2.9.24; *Mack.* 2.5.25, 26; *Obs.* 352; *Bankt.* 2.4.40; 2.9.46; *Ersk.* 2.5.61, 66, 68, 70; *Sandf.* on Ent. 303; *Stat.* 1617, c. 15; *supra*, p. 18.

⁶⁵ *E. Wemyss v. Murray*, 17th Nov. 1815, F.C. 8, aff. 1 *Bligh*, 339, 6 *Pat.* 465, 551.

⁶⁶ *Mordaunt v. Innes*, 9th March, 1819, F.C. 679; aff. 1822, 1 S. App. 169; *vide* 2 S. 32 (N.E. 28); and *Innes v. Duke of Gordon*, 1827, 6 S. 279.

⁶⁷ *Malcolm v. Bardner*, *supra*, ⁶⁰. In *Forbes v. Wilson*, 1873, 11 M. 454, the question was treated as difficult, and did not require to be decided.

⁶⁸ 1 *B.C.* 70; *Sandf.* on Ent. 303; *St.* 2.3.59, Note (by Brodie), p. 272; 1 *Hunter*, 103; *B. Pr.* 1752; 1 *Bell, Leases*, 129.

ing-lease, not an ordinary agricultural tack.⁶⁹ But it may be permitted to take more general ground, and submit⁷⁰ that the Court would here, as in other cases of contract, decline to reform the agreement of parties, especially where the term requiring alteration is *inter essentialia*, and affects the frame of the whole transaction in the most intimate way; on the same principle as it would decline to validate a lease illegal on account of a grassum by distributing the fine all over the lease proportionally as increased rent.⁷¹ And the contrary proposition is nowise helped by a decision supporting a lease, nominally too long, but really within the permissible limit, counting from its date;⁷² nor by another case in which it was thought that a valid deed by an heir of entail could stand by itself, though a gratuitous alienation, granted at the same time but quite separable, were cut down, the other party making no objection to the severance.⁷³ Yet a lease in which alternative periods of duration are stipulated for, the shorter period or periods to come into operation in the event of the longer periods being found to be *ultra vires*, is a legal contract, and will be enforced.⁷⁴

In order to cut down a lease it is not sufficient to show that it was granted by a former heir in possession after accepting a renunciation of a current lease provided the succeeding heirs be not injured by fraud or gross negligence in negotiating for the new lease,⁷⁵ or that it was granted pending, and to commence at the ish of, a current lease, provided the one ends and the other begins during the granter's possession. But at common law, if a new lease be granted to commence upon the expiration of a current lease, the new one will be invalid against a succeeding heir,⁷⁶ or against a singular successor, if the estate be sold,⁷⁷ should it not be followed by possession before the succession opens to him. Without possession a lease is not a real right, and therefore not obligatory upon an heir taking only under the entail. But the

Renunciation followed by new lease.

⁶⁹ *Miller v. Carrick*, 1867, 5 M. 715 [diss. L. Curriehill (I.)].

⁷⁰ 1 Hunter, 103.

⁷¹ *D. of Queensberry's Exrs. and Hyslop v. D. of Buccleuch*, 6th July 1820, F.C. 164, aff. 1821, 1 S. App. 59, 64; *E. Wemyss v. Exrs. of D. of Queensberry and Murray*, 2nd Feb. 1821, F.C. 256.

⁷² *Agnew v. Macniven*, 23rd June 1813, F.C. 400; 1 B.C. 70; Sandf. on Ent. 303.

⁷³ *Cleland v. Morrison*, 1878, 6 R. 156.

⁷⁴ *E. Wemyss v. D. Queensberry's Exrs.*, 17th Nov. 1815, F.C. 8; 1 Bligh,

339; 6 Pat. 465; 1 Sh. 483 (N.E. 449).

⁷⁵ B. Pr. 1752; *More's Notes*, 186; *M. Queensberry v. Exrs. of D. of Queensberry*, 15th Nov. 1815, F.C. 1, aff. 6 Pat. 551.

⁷⁶ *Redhead v. Kerr*, 1792; *Bell's Ocl. Ca.*, rev. 3 Pat. 309; *Downie v. Campbell*, 31st Jan. 1815, F.C. 182, overruling *Campbell v. Love*, 1772, M. 15519, 5 B.S. 622.

⁷⁷ *E. of Aberdeen v. Farquhar*, 1731, in Sandf. on Ent. p. 332 (homologation by receipt of rent not admitted).

granter or his personal representatives may be liable in damages to the lessee.⁷⁸ The impolicy of thus leaving to the last moment the rearrangement of the possession of subjects in use to be let, produced a relaxation of the rule, first in regard to Montgomery leases, which might be granted at any period within one year of the determination of an old lease.⁷⁹ And now, in regard to all leases current for a term of not less than seven years, the heir in possession may 'at any time, within two years previous to the expiration of such lease, grant a new lease at a fair rent, to commence at such expiration, and if such heir in possession shall die before the commencement of the new lease, it shall be 'as valid as if he were still alive,' subject to the sanction of nullity, if a grassum or if less than the fair rent be taken.⁸⁰

Fair rent.

(2) *At a Fair Rent*.—If the rent be so materially inadequate as not to be a fair rent at the date of granting (which is the point of time to be looked to in making the estimate), the lease will be reducible. Thus, a lease of lands which was granted by an heir of entail in implement of an agreement entered into seventeen years previous to its date, fell under this rule, in spite of the fact (which was regarded as irrelevant) that the tenant had erected a dwelling-house at an expense much greater than was necessary for a farm-house and steading suitable to the lands.⁸¹ The rent may be unfair, either by unnecessarily being lower than the former rent,⁸² or by being stationary when a higher rent might have been safely obtained. In either case, there must be 'some unfairness, some fraud, or some gross culpable negligence operating as mischievously as fraud.'⁸³ This element of fraud will be evident on the face of the transaction, if in order to make provisions to children or to liquidate debt a lease be granted to a confidential person at a low rent, with power to sublet, and under obligation to repay the surplus thereby obtained. Such a lease may be reduced at the instance of a succeeding heir,⁸⁴ and the confidential person or trustee interposed will be bound to account to him for the surplus rents effeiring to the period subsequent to his succession.⁸⁵ The same element of fraud on

⁷⁸ *Downie v. Campbell, supra*, ⁷⁶.

⁷⁹ 10 Geo. III. c. 51, sect. 7.

⁸⁰ 45 & 46 Vict. c. 53, in pursuance of the same policy as in the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 62, sect. 28).

⁸¹ *Gray v. Skinner*, 10th June 1854, 16 D. 923.

⁸² Opinions in *Elliot v. Currie*, 1798,

M. 15450; Sandf. on Entails, 318.

⁸³ Per L. Eldon in *Ms. Queensberry v. D. Queensberry's Exrs.*, 1820, 6 Pat. 551.

⁸⁴ *D. Hamilton v. Waring*, 1820, 2 Bligh 196, 6 Pat. 644; *L. Elibank v. Hamilton*, 1827, 6 S. 69, overruling *Macgill v. Law*, 1798, Sandf. on Entails, 320.

⁸⁵ *Justice v. Ross*, 1829, 8 S. 108.

the entail would be obvious on the face of a transaction by which the rent should be stipulated to diminish as the lease went on, or after a certain number of years, or after the lessor's death.

The common law, as thus stated, is frequently summed up in old entails by a prohibition against letting 'below the just rent' ^{'Below just rent.'} 'or avail for the time.' Whether the other formula insisting on letting 'without diminution of the rental [or rent]' ^{'Without diminution of rental.'} ⁸⁶ means anything more and prohibits the acceptance of a lower rent than that of the current lease in any circumstances, has never been determined, probably on account of the almost continuous prosperity of the landed interest till within recent times. And now, 'notwithstanding any prohibition contained in any deed of entail against granting leases unless such leases are without diminution of rental, it shall be lawful for any heir of entail in possession of an entailed estate to grant leases for such period as it may be otherwise competent for him to do at a fair rent,' under sanction of nullity if a grassum be taken, or the rent be less than a fair rent. ⁸⁷ But Montgomery leases can still only be granted 'for a rent not under the rent payable by the last lease or sett.' ⁸⁸

(3) *Without Grassum*.—A grassum is a sum of money paid or ^{Grassum.} promised to the lessor, besides the periodical rent, and necessarily effecting a diminution of that rent. ⁸⁹ Grassums were originally deemed the distinguishing marks of that species of leases called rentals, ⁹⁰ but were afterwards adopted by the proprietors of entailed estates, either in order to create a fund of credit for the direct benefit of the granters, or as the means of making provisions for their widows and children, who, by reason of the limitations, would otherwise have been very scantily provided for. ⁹¹ In the earlier cases in which doubts were raised as to the legality of the heir taking to himself a benefit which he did not share with his successors, the question did not require to be decided. In one case, the succeeding heir, instead of reducing, adopted the contract by getting for his own behoof the bonds and bills taken by his predecessor as securities for future rents. ⁹²

⁸⁶ 1 B.C. 73; Sandf. on Entails, 305; Ersk. 3.8.29, note; St. 2.3.59; Queensberry Cases, *passim*, esp. 5 Dow 293; 1 Bligh, 339, 534; 6 Pat. 465, 548, 551; Christie v. McDonald, 1870, 7 Sc.L.R. 180.

⁸⁷ 45 & 46 Vict. c. 53, sect. 8.

⁸⁸ 10 Geo. III. c. 51, sect. 7.

⁸⁹ Balfour, 203; Cr. 2.10.4; St. 2.9, 16, 17, and 20; Mack. 2.6.9; Ersk. 2.6.37.

⁹⁰ Cr. *supra*, ⁸⁰, compared with 2.9.34; St. and Mack. *supra*, ⁸⁹; Bankt. 2.9.45.

⁹¹ Ersk. 2.6.37; 1 B.C. 73; Sandf. on Ent. 312, note †; 1 Bell, Leases, 127, note (b).

⁹² Denham v. Wilson, 1761, M. 15512, as explained by Lords Eldon (C.) and Redesdale, in D. Buccleuch v. D. Queensberry's Exrs., 1 Bligh 464, 507.

In another case,⁹³ there was a power to grant leases on whatever terms the heir in possession thought proper. In a third case,⁹⁴ there was a good plea of personal bar. In a fourth case,⁹⁵ the point was avoided. But in all of these cases, down to the end of last century, the general opinion, on the Bench as elsewhere, seems to have been strongly in favour of a power which, while liable to gross abuse, might enable an heir in possession to temper the rigour of the law of entail in its effect on members of his family as dear to him as his eldest son. But the celebrated litigations, known as the Queensberry Leases, arising out of a flagrant misuse of what was at the time believed to be a general power of heirs of entail, involved the whole system of granting leases with grassums in a common ruin. For it was in the end determined, after many years of litigation,⁹⁶ that a grassum is anticipated rent, and therefore that a lease made upon a grassum paid to the granter is an alienation *pro tanto* of the rent;⁹⁷ that a power in an entail to make leases 'without diminution of the rental, at the least at the just avail for the time,' means, at the fair value at the time of leasing, not at the last rent, which may have been fixed at a period much anterior, (rental in that clause being the same in construction as rent);⁹⁸ that the heir in possession, by taking a grassum, effects a diminution of the rental, and does not take the just avail for the time;⁹⁹ that numerous leases granted by the heir in possession for his own benefit and to the prejudice of the succeeding heir, operate as a fraud upon the entail;¹⁰⁰ that all leases open to these objections, or any of them, are liable to be set aside; and that the existence of a grassum may vitiate not only the lease at whose commencement it was stipulated for, but any new lease substituted for it during its currency,¹⁰¹ or even a third lease similarly substituted for the second during its currency.¹⁰²

Lease of *universitas* of large estate.

(4) By leasing for long periods to a favoured person, not the heir of entail next in succession, the *universitas* of a large

⁹³ *Leslie v. Orme*, 1779, M. 15530; aff. 2 Pat. 533.

⁹⁴ *Elliot's Trs. v. Elliot*, 1793, M. 15622.

⁹⁵ *Elliott v. Curries*, 1798, M. 15450.

⁹⁶ *D. Buccleuch v. D. Queensberry's Exrs.*, and *D. Queensberry's Exrs. v. E. Wemyss*, 1819, 1 Bligh 339, 6 Pat. 465. The earlier stages of these cases are to be found in 14 F.C. 7; M. Appx. Taillie, No. 15; Buch, Rem. Ca. 408; 2 Dow, 90;

5 Pat. 758; 17 F.C. 298; 19 F.C. 1, 8, 105, 466; 5 Dow, 293.

⁹⁷ At 1 Bligh, 509.

⁹⁸ *Ibid.* 530.

⁹⁹ *Ibid.* 528.

¹⁰⁰ *Ibid.* 467, 483.

¹⁰¹ *Ibid.* 436.

¹⁰² *E. Wemyss v. D. Queensberry's Exrs.*, 1821, 1 S. 202 (N.E. 190), on the remit in 1 Bligh, 339.

estate, or so much of it as is capable of alienation, an attempt has been made in effect to alter the order of succession for a time.¹⁰³ Similar attempts have been made by alienations under colour of feuing large pieces of ground by feu rights granted *unico contextu*, extending together over the whole or a large part of an estate.¹⁰⁴ In both cases the simulate transaction is cut down, the principle being in both the same,—viz., that common law powers or powers expressly conferred in an entail to feu or lease, are intended to aid in the rational and fitting administration of the estate and for no other purpose. In the case of leasing referred to, the real purpose of the granter was made clear, not only by the unusual comprehension of the lease and its unusual duration, but also by the inadequacy of the rent.

In every case of contravention, the remedy of the heirs is Remedies. twofold.¹⁰⁵ If the contravener survive, the next heir or any substitute is entitled to bring a declarator of irritancy,¹⁰⁶ to have it declared that all right, title, and interest of the contravener to and in the entailed estate is, and shall be, void and extinct, and that the estate has devolved on the next heir. And, whether the contravener survive or not,¹⁰⁷ an action of reduction is competent for the purpose of cutting down the offending lease. Both actions may go on together, but if so, decree of irritancy Purgation. must be obtained before decree of reduction.¹⁰⁸ If the contravener survive, purgation may take place before decree of irritancy is granted, provided *restitutio in integrum* be possible, and this doctrine applies to leases granted in contravention of an entail.¹⁰⁹ If the contravener be dead, and declarator of irritancy be therefore incompetent, the general rule holds that purgation is no bar to decree of reduction. Therefore an offer by a tenant to purge by distributing the grassum proportionally over the years past and future of his lease, did not save him from having his lease cut down.¹¹⁰ These are the only remedies competent to the

¹⁰³ *Bs. Mordaunt v. Innes*, 9th March 1819, F.C. 679, aff. 1 S. Ap. 169; *Innes v. D. Gordon*, 1827, 6 S. 279.

¹⁰⁴ *L. Cathcart v. Schaw*, 1755, M. 15399, 5 B.S. 816, aff. 1 Pat. 618; *Innes v. Ker*, 1807, M. Appx. Tailzie, 13-18; rem. 5 Pat. 609; 17th July 1813, F.C. 374; 2 Dow, 149; 5 Pat. 768.

¹⁰⁵ Cases collected in Rankine, Land-ownership, 574.

¹⁰⁶ See *Bontine v. Graham*, 1837, 15 S. 711; 3 Jur. Styles, 190.

¹⁰⁷ *D. Queensberry's Exrs. v. Hyslop*, 6th July 1820, F.C. 164, aff. 1 Sh. Ap. 59; *Agnew v. Gillespie*, 23rd June 1813, F.C. 402; *Turner v. Turner*, 1 Dow 423.

¹⁰⁸ *Bontine v. Dunlop*, 1823, 2 S. 115 (N.E. 106).

¹⁰⁹ *Abernethie v. Gordon*, 1835, 13 S. 263, 15 S. 1167; aff. 1 Rob. Ap. 434, per L. Chan. at p. 470.

¹¹⁰ *D. Queensberry's Exrs. v. Hyslop*, and *v. D. Buccleuch*, 6th July 1820, F.C. 164, aff. 1 Sh. Ap. 59, 64.

landlord.¹¹¹ He cannot maintain an action of damages.¹¹² On the principle that if both parties are not bound neither party is bound, the tenant would also be entitled to obtain reduction of a lease which was *ultra vires* of the granter. And, if ousted by a reduction, he is entitled to indemnification by suing for damages on the warrandice in his lease.¹¹³

III. STATUTORY RELAXATIONS.¹¹⁴

These came into existence first in 1770, and they have been gradually extended by legislation, reaching down to very recent times. They may be divided into four classes—

(1) *Ordinary Statutory Powers.*

First in logic though not in time come the *ordinary* powers of leasing bestowed by statute. The Act by which they are conferred or recognised is known as the Rosebery Act, 1836 (6 & 7 Will. IV. c. 42). After a preamble narrating the legal effect of a strict entail¹¹⁵ on the disposal of the estate and the expediency of conferring certain powers on heirs in possession,¹¹⁶ it enacts that—

Ordinary
statutory
powers.

Heirs of entail
in possession
may grant
tacks of any
part of entailed
estates under
the restrictions
herein con-
tained.

Notwithstanding any prohibitory, irritant, and resolute clauses contained in any entails already made and established, or which may hereafter be made and established, pursuant to the directions of the said Act passed in the Parliament of Scotland in the year one thousand six hundred and eighty-five, it shall be lawful for the respective heirs of entail in possession to grant tacks of any parts of the lands, estates, or heritages therein contained, for the fair rent of such lands or heritages at the period of letting, either by public auction or private bargain, and notwithstanding any prohibition against diminution of the rental, for any period not exceeding twenty-one years, and to grant tacks of any mines and minerals contained in such lands and estates for any period not exceeding thirty-one years: Provided always, that nothing herein contained shall authorise any heir of entail in possession of any entailed lands, estates, or heritages to take any grassum or valuable consideration, other than the tack-duty or rent, for granting any tack, or to grant any tack of the home farm, nor of the mansion-house and offices, or of the garden, lawn, park, or policy attached thereto, for any period beyond his own life; and in case any such grassum or consideration shall

¹¹¹ E. Breadalbane v. Jamieson, 1877, 4 R. 667.

¹¹² Ms. Queensberry v. Queensberry's Exrs., 1826, 4 S. 320; rem. 2 W. and S. 265, 6 S. 706, rev. 4 W. and S. 254.

¹¹³ *Infra*, chap. x.

¹¹⁴ The procedure under these statutes,

being scarcely part of the law of leases, is here omitted.

¹¹⁵ The powers are extended to heirs in possession under unrecorded entails by 1 & 2 Vict. c. 70.

¹¹⁶ Including institutes and trustees for entailing (sect. 20).

be taken, or in case any tack hereby prohibited shall be granted, such tack shall be null and void (sect. 1).

Provided also, and be it enacted, that nothing herein contained shall prevent or be construed to prevent any heir of entail in possession from exercising any power of granting tacks which may be contained in the entail under which he possesses more extensive than the power of granting tacks hereby conferred (sect. 2).

This Act not to restrain any more extensive power contained in any entail.

No application to the Court for special power is required or admissible. The rules relating to the exclusion of the mansion-house,¹¹⁷ and to the permission to ignore a prohibition against diminution of the rental,¹¹⁸ and to let at any time within two years of the ish of a former lease,¹¹⁹ are noticed elsewhere. It will also be shown that though an express prohibition against letting may be wiped out by the statute, a further restriction, not necessarily dependent on, though intimately connected with, the other will not necessarily disappear along with it.¹²⁰

(2) *Montgomery Powers.*

First in time came the Montgomery leases, authorised by the earlier sections of the Montgomery Act, 10 Geo. III. c. 51, for two purposes—the promotion of agricultural improvements and of building. The statute is now so little resorted to that it need not be quoted in full. For the former of these purposes it sanctions leases for not more than fourteen years from Whitsunday next after their date, and for the life of a person in existence and to be named in the tack; or for two existing lives and the life of the survivor, or for not more than thirty-one years (sect. 1), provided that in a lease for two lives there be an obligation on the tenants to enclose the whole lands in thirty years, two-thirds in twenty years, and one-third in ten years; that in a lease for more than nineteen years,¹²¹ there be an obligation to enclose the whole lands in the course of the lease, and two-thirds of the lands before two-thirds of its course have run, and one-third before one-third has run (sect. 2); and as to both sorts of leases that there be an obligation laid on the tenants to keep the fences in good and sufficient repair during the lease, and to leave them so at its expiration; and that no enclosure should contain more than forty acres where the land is arable (sect. 3).¹²²

Montgomery powers.

For agricultural improvement.

The sections designed to promote the 'building of villages and houses' enact that leases for the purpose of building may be

For building.

¹¹⁷ *Infra*, p. 70.

¹¹⁸ *Supra*, p. 55.

¹¹⁹ *Supra*, p. 54.

¹²⁰ *Clerk v. Clerk, infra*, p. 69.

¹²¹ See *Mure v. Mure*, 22nd Dec. 1808,

F.C. 64.

¹²² The provisions of sect. 7, *infra*, p. 60, with regard to rent, grassum, and commencement of lease also apply.

granted for any number of years not exceeding ninety-nine years (sect. 4), under these provisos—(a) that not more than five acres be granted to any one person; (b) that there be inserted in the lease a condition annulling it if a dwelling-house of the value of £10 or upwards be not built within ten years of its date for each half-acre; (c) that the houses be kept in good tenantable and sufficient repair; (d) that this standard as to number, value, and repair be kept up, under pain of nullity (sect. 5); (e) that the manor-place and its accessories should be spared (sect. 6);¹²³ (f) that the rent be not under the rent payable under the last tack; (g) that there be no grassum; and (h) that the last lease shall, if for a fixed term of years, be within a year of its termination (sect. 7). Ampler powers contained in any tailzie are saved (sect. 8).

Cases.

The Act does not apply to unrecorded entails.¹²⁴ It is strictly interpreted.¹²⁵ An improving lease, in which the duration is left to the option of the tenant within the limits set forth in the Act, is permissible, and may be secured against challenge by a declaration of the option.¹²⁶ The obligation to keep the fences in good repair apply not only to those fences which are made in exact accordance with the dates prescribed, but to such also as anticipate the statutory periods.¹²⁷ A grassum will be none the less fatal though it take the form of an obligation to pay the lessor's debts.¹²⁸ In a very special case the fact that a grassum taken in the last lease was not calculated on when fixing the rent in a building lease of part of the land was not allowed to cut down the latter where there had been complete *bona fides* on the part of the lessee.¹²⁹ The tenant under a building lease is entitled, in so far as is necessary for his reasonable enjoyment, to cut down timber growing on the land let to him; and the question of necessity depends on the special circumstances of each case.¹³⁰ And, lastly, the condition in building leases in regard to the erection of dwelling-houses within a certain period under sanction of nullity imports not a purgeable irritancy but a statutory nullity, which may be taken advantage of by the heir in possession succeeding the lessor, though the latter has by back-letter or otherwise dispensed with performance; and the lease cannot even

¹²³ *Infra*, p. 70.

¹²⁴ *Paget v. E. Galloway*, 1837, 15 S. 667; *L. Macdonald v. Macdonald*, 1840, 2 D. 889, aff. 1 B. Ap. 819.

¹²⁵ *Thomson v. Mowat*, 1824, 3 S. 385 (N.E. 272); *Miller v. Carrick*, 1867, 5 M. 715, aff. 6 M. (H.L.) 101.

¹²⁶ *L. Elibank v. Pentland*, 1821, 1 S. 117 (N.E. 115).

¹²⁷ *Hamilton*, 1846, 8 D. 308, 9 D. 53.

¹²⁸ *Mure v. Mure*, *supra*,¹²¹.

¹²⁹ *D. Buccleuch v. Ewart*, 1827, 6 S. 128, *sed quare*.

¹³⁰ *Gordon v. Rae*, 1883, 11 R. 67.

stand for the period which the deed of entail expressly permits, not being a lease of ordinary administration.¹³¹

(3) *Powers obtainable on Petition.*

The Rutherfurd Act and its numerous amendments confer powers of leasing in three different sets of circumstances, which have this only in common, that the authority of Court is required to make the transaction effectual. Powers conferred since 1848.

(a) *With Consents.*—An heir in possession is entitled to let out the estate in whole or in part without restriction, provided he obtains the consent of the heirs whose consent is necessary to a disentail, or gets their consent dispensed with. This power is necessarily involved in the greater power to disentail, and is conferred by provisions¹³² which closely follow, in frame and sequence, the disentail provisions. Since in most cases¹³³ it is equally open to the heir in possession to resort to the powers dealt with in the following paragraph, without requiring to obtain consents, it will be enough here to refer to the statutes, and to note that the consents required when the entail is a new entail are those of the 1st and 3rd sections of the Rutherfurd Act.¹³⁴ Consent being obtained.

(b) *Long Leases.*—The power to grant long leases is of much greater importance. It is always associated in the entail statutes with the power to grant feus. The leading enactment is the 24th section of the Rutherfurd Act, 11 & 12 Vict. c. 36. Long leases.

Notwithstanding any prohibitory, irritant, and resolute clauses, or any limitation by way of maximum or minimum of the extent of ground to be feued or to be granted in each separate feu, contained in any tailzie dated prior to the first day of August one thousand eight hundred and forty-eight, it shall be lawful for an heir of entail in possession of an entailed estate in Scotland, upon notice to the heir of entail next entitled to succeed to such estate immediately after such heir of entail in possession, with the approbation of the Court, to be obtained in the form and manner hereinafter provided, to grant feus or long leases of any part of the said entailed estate for the highest feu-duty or rent that can be got for the same, such feus or long leases so granted by him not exceeding in all one-eighth part in value for the time of such estate; provided always, that it shall not be lawful for such heir to take any grassum or fine or valuable consideration other than the tack-duty or rent for granting any such feu or lease, nor to grant any such feu or lease of the mansion-house, offices, or policies of the estate; and such heir shall be entitled to make, Power to grant feus or long leases.

¹³¹ *Miller v. Carrick, supra*, ¹²⁵ (powder magazine only erected).

¹³² 11 & 12 Vict. c. 36, sect. 4; 38 & 39 Vict. c. 61, sect. 6; and 45 & 46 Vict. c. 53, sect. 4, 5.

¹³³ Except as to the mansion-house and its accessories. See *infra*, p. 70.

¹³⁴ Campbell, 1883, 20 Sc.L.R. 474.

at the sight of the Court, all such feu-charters or other feu-rights, or tacks or leases, as shall be necessary; and in case any such grassum, fine, or consideration shall be taken, and in case any feu or lease hereby prohibited shall be granted, such feu or lease shall be null and void; but nothing herein contained shall prevent or be construed to prevent any heir of entail in possession from exercising any power of granting feus or leases which may be contained in the tailzie under which he possesses, more extensive than the power of granting feus or leases hereby conferred.

This power is extended ¹³⁵ to heirs in possession under new entails (*i.e.*, entails executed after 1st August 1848), 'which do not expressly prohibit the granting of feus or building leases of the entailed estate or any part thereof, though containing a prohibition against alienation and long leases generally,' and subject to the proviso that the 'Court, having regard to the interests of the heirs substitute of entail, shall be satisfied that the granting of such feus or leases is an act of beneficial administration of the entailed estates;' but instead of 'long leases' this extension speaks only of 'building leases for more than twenty-one years.' ¹³⁶ The authority may be granted on a continuing petition, for (16 & 17 Vict. c. 94, sect. 6)

Competent to present continuing petitions for authority to grant feus and long leases. ¹³⁷

It shall be lawful for the Court, upon an application by an heir of entail entitled, in terms of the said recited Act, to apply for the authority and approbation of the Court to the granting of feus and long leases, to an extent not exceeding in all one-eighth part in value for the time of the entailed estate, to fix and determine the minimum rates of feu-duty or tack-duty at which the lands specified in such application, or the different portions of such lands where the same are of different values, may be feued or let on long leases; and such minimum rate or rates of feu-duty or tack-duty, being so fixed by interlocutor of the Court, shall be acted upon with reference to all feus or long leases which may be granted from time to time under such application, unless the Court, upon being moved to that effect by such heir of entail, or by any other party entitled to appear, shall afterwards alter the same (which the Court is hereby authorised to do, from time to time, upon motion to that effect as aforesaid), in which case such altered rate or rates of feu-duty or tack-duty shall be substituted for the rate or rates of feu-duty or tack-duty previously established; and in like manner it shall be lawful for the Court, upon such application as aforesaid, to approve, by interlocutor, of a form of feu-charter, feu-contract, or feu-disposition, or a form of long

¹³⁵ By 15 & 16 Vict. c. 94, sect. 13.

¹³⁶ This is clearly a case of faulty drafting, for building leases are nowhere mentioned (contrary to what is stated in the Act of 1853), in the Rutherford Act, and

the only reference possible is to the long leases in the section above printed.

¹³⁷ Campbell, 1850, 13 D. 42 (under Act 1848, sect. 4); Butter, 1852, Dunc. p. 343; Cleland, 1852, 24 Sc. Jur. 623.

lease, to be made use of under such application, from time to time as such feus or long leases shall be granted, and to grant authority to such heir of entail to grant feus or long leases in the form so approved of, from time to time, as he shall think proper, subject to any conditions or stipulations¹³⁸ which the Court may deem necessary ; and such form may be altered by the Court from time to time as the Court shall see fit in the course of the proceedings ;¹³⁹ Provided always, that it shall not be lawful for such heir of entail to take any grassum or fine or other valuable consideration other than the feu-duty or rent for granting any such feu or lease, nor to grant any such feu or lease of the mansion-house, offices, or policies of the estate ; and in case any such grassum, fine, or consideration shall be taken, and in case any feu or lease hereby prohibited shall be granted, such feu or lease shall be null and void.

Application for authority under these sections can now be made in the Sheriff-Court, subject to appeal to the Court of Session ; and the procedure in the Sheriff-Court must be as nearly as possible the same as that set out in next paragraph.¹⁴⁰ The authority granted is available not only to the applicant, but to the succeeding heirs of entail.¹⁴¹ The application may now be made by a tutor on behalf of a pupil heir,¹⁴² and by other guardians or with their consent ; by an heir in possession and infest, though a competition of services may be pending at the time,¹⁴³ and by an heir in possession though he have sold his life-interest in the property.¹⁴⁴ The applicant should be infest at least in the parts of the estate which he proposes to lease out.¹⁴⁵ He may proceed by private bargain.¹⁴⁶ The term 'long leases' in the leading enactment has been interpreted as meaning leases longer than those which are ordinarily granted in regard to the particular subject let, or longer than the term allowed by the entail ; not merely building leases or such leases as substantially convey, like the feus so closely associated with them, the full rights of ownership. The Court could, therefore,

In Sheriff-Court.

The applicant.

Meaning of 'long lease.'

¹³⁸ *E.g.* Rights in the nature of servitudes—*Stewart v. Stewart*, 1877, 4 R. 981, 6 R. 145.

¹³⁹ See case of such alteration—*E. Kinnoull*, 1862, 24 D. 379. Though model charters for different sorts of feus are approved of—*e.g.* for villas, shops, &c.—the selection of the nature of each feu is left to the discretion of the heir,—*ibid.* There is usually a relative plan, which is incorporated in the deeds—

Dunc. p. 59.

¹⁴⁰ 45 & 46 Vict. c. 53, sect. 5.

¹⁴¹ *Ibid.* sect. 6 (3).

¹⁴² *Ibid.* sect. 11, altering the law in *Boyle*, 1853, 15 D. 420.

¹⁴³ *Livingstone v. Fenton*, 1858, 20 D. 1231.

¹⁴⁴ *Gordon v. Pr. Albert*, 1851, 14 D.

114.

¹⁴⁵ *E. Stair*, 1852, 1 Stu. 578.

¹⁴⁶ *Hastings*, 1549, 12 D. 918.

competently sanction a nineteen years lease of land out and out, where its only value was for sporting purposes.¹⁴⁷

(c) *Building Leases*. — Lastly, large powers of granting building leases may be obtained from the sheriff. By the Entail Act of 1868,¹⁴⁸ it is enacted that

Power to grant feus, building leases, &c.

It shall be lawful for any heir in possession of an entailed estate, notwithstanding any prohibitions or limitations in the deed of entail or in any Act of Parliament, in the manner and subject to the conditions hereinafter mentioned, to grant leases for the purpose of building for any number of years not exceeding ninety-nine years, or feus of any part of such estate (but reserving the minerals therein and the right of working the same), except the garden, orchards, policies, or enclosures, adjacent to or in connection with the manor place, in so far as such garden, orchards, policies, or enclosures are necessary to the amenity of the manor place, or, if the estate be held by burgage tenure, to dispose any part thereof, reserving and excepting as aforesaid, subject to a ground-annual: Provided always, that the feu-duty, rent, or ground-annual to be stipulated for shall not be less than the amount ascertained as hereinafter provided: Provided also, that it shall not be lawful for such heir to take any grassum or fine or valuable consideration other than the feu-duty, rent, or ground-annual for granting any such charter, lease, or disposition; and in case any such grassum, fine, or consideration shall be taken, such charter, lease, or disposition shall be null and void; but nothing herein contained shall prevent any heir of entail in possession from exercising any power of granting feu-charters, leases, or other grants which may be contained in the entail under which he possesses, more extensive than the powers hereby conferred.

Procedure in granting feus, building leases, &c.

For ascertaining whether the land so proposed to be feued, leased, or disposed may be feued, leased, or disposed in terms of the provisions of the preceding section, and the value of the same, an application shall be made by the heir in possession of the entailed estate to the sheriff of the county within which the entailed estate, or the portion thereof proposed to be feued, leased, or disposed, is situated, who thereupon shall direct notice to be given to the next heir of entail entitled to succeed to the entailed estate in such manner as shall seem proper (and in the event of such next heir of entail being under age or subject to any legal incapacity, the sheriff shall appoint a tutor *ad litem* or curator *ad litem* to such heir), and shall appoint one or more skilful persons to inquire and report as to the value of the lands proposed to be feued, leased, or disposed, and whether from their position or otherwise they may or ought to be feued, leased, or disposed in terms of the preceding section either in whole or in lots; and upon such person or persons reporting that the feu-duty, rent, or ground-annual offered is in their opinion,

¹⁴⁷ *Farquharson v. Farquharson*, 1870, 9 M. 66. See note, *supra*, ¹³⁶.

¹⁴⁸ 31 & 32 Vict. c. 84, sects. 3-5.

having regard to all the circumstances, fair and adequate, and that such land may, from its position, be feued, leased, or disposed in terms of the preceding section either in whole or in lots, the sheriff, on consideration of the whole circumstances, may and is hereby empowered to authorise such heir in possession or his successor in the entailed estate at any time within ten years from the date of such deliverance to feu, lease, or dispose the said land in one or more lots at such rate of feu-duty, rent, or ground-annual as he can obtain for the same, not being less than the rate fixed by the said skilled persons, subject to such conditions as the sheriff may think essential to secure such feu-duty, rent, or ground-annual, and any other conditions he may see fit, and also subject to a nominal taxed sum of one penny sterling in lieu of all casualties on the entry of heirs and singular successors, and to grant the necessary feu-charter, lease, or disposition, and which being executed and recorded in the Register of Sasines shall be effectual to all intents and purposes; and the lands so feued, leased, or disposed shall, from the date of recording the feu-charter, lease, or disposition in the Register of Sasines, and so long as such feu-charter, lease, or disposition shall remain in force, be held as out of the entail, and be liberated from all the prohibitory, irritant, and resolute clauses or clause of registration thereof; provided always, that the superiority of the lands so feued, leased, or disposed, and the feu-duties, rents, and ground-annuals thereof, shall be and shall remain subject to the said entail in the same manner as the lands themselves were subject thereto previous to the granting of such feu-charter, lease, or disposition; and it is hereby provided, that the decree of the sheriff pronounced on such application and proceeding shall not be subject to review by suspension, advocacy, or reduction, or in any other form, except by a short note of appeal to be presented to the Court of Session in one or other of the Divisions thereof, which appeal shall be disposed of by such Division as a summary cause: Provided always, that unless such note of appeal shall be lodged with the clerk of the Division of the Court of Session, and notice thereof given in writing to the opposite party, or his known agent, or lodged with the sheriff-clerk, within six months of the date of the decree of the sheriff, such decree shall be final and conclusive; and, in the event of an appeal being duly taken and lodged, the judgment of the Court of Session thereon shall be final and conclusive.

Provided always, that every such feu-charter, lease, or disposition shall contain a condition that the same shall be void, and the same is hereby declared void, if buildings of the annual value of, at the least, double the feu-duty, rent, or ground-annual therein stipulated shall not be built within the space of five years from the date of such grant upon the ground comprehended therein, and that the said buildings shall be kept in good, tenantable, and sufficient repair, and that such grant shall be void whenever there shall not be buildings of the value foresaid,

Feu-charters, &c., to be void unless buildings of certain value erected and kept in repair.

kept in such repair as aforesaid, standing upon the ground so feued, leased, or disposed.

Competent
clauses in such
leases.

The rules contained in last paragraph regarding succession to the authority and regarding the title to sue are equally applicable here. A condition reserving power to the lessor to resume part of the land let, subject to a corresponding abatement of rent, is not 'a valuable consideration other than the rent' in the sense of the leading section, since it is not stipulated for the benefit of the grantor alone. A reservation of timber for the grantor's own behoof will or will not be regarded as such valuable consideration according as the wood is or is not ripe for cutting, and is or is not of substantial value. But the fifth section demands that certain buildings shall be erected after the date of the lease, and it would not be enough to set out in the lease that buildings of the requisite amount had been already erected, with an irritancy in the event of there ever ceasing to exist on the land buildings in good repair and of the statutory value.¹⁴⁹

(d) *Special Powers for Public Purposes only.*

The most recent entail statute enacts ¹⁵⁰—

Where application is made for authority to grant a feu or a lease of a portion of an entailed estate, not exceeding two acres in extent, for a scientific purpose, or other purpose of public utility, the Court or the sheriff, if satisfied that it would be for the public advantage, and not prejudicial to the estate, may grant such authority for such yearly feu-duty or rent as may be agreed upon, though inadequate and below the just value, subject to such conditions as the Court or the sheriff may think fit.

Provided that it shall not be lawful for the applicant to take any grassum or consideration for granting such feu or lease other than the feu-duty or the rent, and if any such grassum or consideration shall be taken such feu or lease shall be null and void.

This enactment was preceded by a number of statutes known as the Entail Sites Acts.

Entail Sites
Acts.

*First,*¹⁵¹ Portions of entailed estates may be feued out or let on long lease to the extent of not more than one-fourth of an acre for the building of a place of Christian worship, one acre for a burying-ground or for a school-house and playground, or one-eighth of an acre for a dwelling-house for a minister or schoolmaster, or half-an-acre for a garden attached to such

¹⁴⁹ *Stewart v. Murdoch*, 1882, 9 R. 458 (conversion of long lease into feu).

¹⁵¹ 1 & 2 Vict. c. 87, was repealed by 36 & 37 Vict. c. 53, sect. 5.

¹⁵⁰ 45 & 46 Vict. c. 53, sect. 6(2).

dwelling-house, though the heir in possession be under age, and though the rent be inadequate, provided the sheriff is satisfied of the propriety of the measure in the whole circumstances, and provided no grassum or exclusive benefit be reserved by the granter (Act 1840).¹⁵² Existing powers of leasing are reserved (sect. 2). The procedure for obtaining the sheriff's sanction is fully set forth (sect. 3); the heir is exempted from forfeiture through the alienation thus authorised (sect. 4). The lessees are prohibited from assigning, subletting, or burdening their grants (sect. 6), and must within five years occupy for the authorised purpose, and continue so to occupy during the whole course of the lease, failing which the subjects revert to the heir in possession for the time being, after certain proceedings before the sheriff (sect. 7).¹⁵³

Second, An Act passed in 1841 to afford further facilities for the conveyance and endowment of sites for schools¹⁵⁴ deserves nothing more than this passing reference, since its provisions, though expressly applicable to Scotland are couched in the language of the English law, and are now superseded in practice by the wider powers contained in the Education Act of 1872.¹⁵⁵

IV. EXCEPTIONAL SUBJECTS.

There are certain subjects, parts of most entailed estates, which require separate notice.

1. MINERALS.

The heir in possession, in the absence of prohibition, is Minerals. entitled to work minerals, and consequently so to lease them as to draw the just profits.¹⁵⁶ It is doubtful whether at common law a prohibition to work or let minerals (which would thus be put *extra commercium*) would be given effect to,¹⁵⁷ only one such prohibition having ever come before the Court.¹⁵⁸ It would not in any case prevent leases of minerals for thirty-one years or under.¹⁵⁹ The rule holds in spite of the fact that the lease is more properly a sale with gradual delivery and at a price payable by instalments. And the only safeguard against undue injury to succeeding heirs is the rule laid down in a carefully con-

¹⁵² 3 & 4 Vict. c. 48, sect. 1.

¹⁵³ Sect. 8 is repealed by the Stat. Law Revision Act of 1874 (No. 2).

¹⁵⁴ 4 & 5 Vict. c. 38, amended by 7 & 8 Vict. c. 37, 12 & 13 Vict. c. 49, and 14 Vict. c. 24.

¹⁵⁵ 35 & 36 Vict. c. 72, sect. 37 (compulsory purchase under the Lands Clauses Acts).

¹⁵⁶ 1 B.C. 53; *Gordon v. Gordon*, 24th January 1811, F.C. 161; *More's Notes*, 187; *Sandf. on Ent.* 276-7; *Ersk.* 3.8.29, note 245; 2 B.C. (6th ed. *Shaw's*) 831, note 6.

¹⁵⁷ *Muirhead v. Young* (2), 1858, 20 D. 592; *per* L.P. McNeill, 602.

¹⁵⁸ *Clerk v. Clerk*, 1872, 10 M. 647.

¹⁵⁹ 6 & 7 Will. IV. c. 42, sect. 1.

sidered case,¹⁶⁰ that there must, in order to the reduction of a lease, be some 'unfairness, some fraud, or some gross culpable 'negligence operating as mischievously as fraud would operate.'¹⁶¹ In that case the whole of the minerals of a large entailed estate were let several years before the question arose at a fixed rent of moderate amount, without the alternative of a lordship or tonnage-rent. There were contained in the lease powers to assign and sublet, to work the coal as the lessee might deem for his benefit, to sink pits without limit as to number or locality, to make roads through any part of the estate necessary for working the coal, to erect colliers' houses, and for that purpose to open quarries and take stone without payment to the landlord. There were no clauses providing for intersectional damage or restoration of the surface on the expiration of the lease. Nor was there a barrier clause, nor any check as to the amount of output, nor provision for the landlord's inspection of the workings. Various other clauses usually inserted in mineral leases for the landlord's protection were omitted. A portion of the coal-field was sublet by the lessee to several subtenants, from whom he obtained a subrent of more than four times the amount paid by him to the landlord. The remainder of the coal-field was in the lessee's own possession, and unwrought. In an action of reduction of the lease raised by a succeeding heir on the ground that it was an alienation or an undue exercise of the power of leasing, and in contravention of the entail and of the Statute 6 & 7 Will. IV. c. 72 (13th August 1836), a proof was allowed. The Court held that there was no proof of unfairness, fraud, or gross negligence, the lease having been at its date a fair and equal contract, under which the lessee took the risk of an unopened and untried field, which then had no practicable means of communication with markets, and which was proved not to have been wrought to profit by the greater number of the sublessees. The absence of a lordship and of an exclusion of subtenants was the main note or mark of inequality relied on by the heir, but without success.¹⁶² If the lease escapes reduction the Court will decline to regulate the tenant's workings out of consideration for the interests of succeeding heirs, or to make him liable in damages.¹⁶³ The entail will not

¹⁶⁰ *Muirhead v. Young* (1), 1855, 17 D. 875.

¹⁶¹ Using the words of L. Eldon in the *Tinwald* case, *supra*, p. 54.

¹⁶² See esp. op. of L. Ivory and Deas,

pp. 893, 911, *ibid*.

¹⁶³ *Muirhead v. Young* (2), *supra*, ¹⁵⁷; and see *E. Breadalbane v. Jamieson*, 1877, 4 R. 667.

be allowed to curtail the liberty of the heir in possession and his tenants further than is necessary for the preservation of the estate and its transmission to succeeding heirs, therefore a prohibition against communicating levels to an adjoining mineral property will be ignored, if and in so far as such communication may be necessary or beneficial to the working out of the minerals on the entailed estate, and not permanently detrimental to its mines, but under condition that as soon as the purpose for which the communication is made has been served the heirs of entail and their lessees shall be bound to close it up so as to keep out the water in the adjoining mines to the rise.¹⁶⁴ If this condition could not have been complied with, the Court would have refused to authorise what would be obviously detrimental to the estate—an alienation for the benefit of part only of the series of heirs.

2. WOODS.

The power of an heir of entail in possession himself to cut down Woods. and dispose of timber being limited to such timber as is 'not required for the reasonable enjoyment of the mansion-house by persons in the rank of life which the inmates of such a house may be supposed to hold,'¹⁶⁵ and to such as has reached maturity,¹⁶⁶ his power to sell growing timber—which frequently takes the name or frame of a lease—is similarly restricted. The only exception would be a lease of the right to thin growing timber—an act of ordinary administration necessary or beneficial to the estate.¹⁶⁷ Further, inasmuch as the representatives of an heir in possession have no right, on his decease pending the cutting of timber, except to the wood then actually severed from the ground,¹⁶⁸ he is not entitled to grant any higher or more permanent right to his vendee or lessee, whose purchase or lease breaks off short on that event taking place, and not on notice thereof reaching him.¹⁶⁹ There does not seem to be any valid distinction between woods planted by the lessor and woods planted by a predecessor,¹⁷⁰ or between planted and natural woods, except that it would probably be held that natural wood set out in haggis, according to the

¹⁶⁴ Clerk v. Clerk, 1872, 10 M. 647.

¹⁶⁵ Boyd v. Boyd, 1870, 8 M. 637, 644, *per* L. Deas; Mackenzie v. Mackenzie, 1824, 2 S. 775 (N.E. 643); Bontine v. Carrick, 1827, 5 S. 811 (N.E. 750); and see Gordon v. Gordon, 24 Jan. 1811, F.C. 161.

¹⁶⁶ Cathcart v. Schaw, 1755, M. 15403, 5 B.S. 818. *aff.* 1 Pat. 618; Ker v. Graham's Trs., 1827, 6 S. 73, 270; Bon-

tine, and Boyd, *supra*,¹⁶⁵; cf. Hamilton v. Vs. Oxfurd, 1757, M. 15408.

¹⁶⁷ Boyd, *supra*,¹⁶⁵.

¹⁶⁸ Cathcart, *supra*,¹⁶⁶; Lord Elibank v. Renton, 1833, 11 S. 238; Veitch, in note to 1 B.C. 53. Stewart v. Stewart's Exrs., 1761, M. 5436, and Pringle v. Scott, 1 B.C. 53, decide nothing to the point.

¹⁶⁹ Veitch, *supra*,¹⁶⁸.

¹⁷⁰ Mackenzie, *supra*,¹⁶⁵.

custom of an estate, for annual cutting (*silvæ cædruæ* in the stricter sense of the word), might be disposed of by an heir in possession, by a lease which would not expire with him.¹⁷¹ Express prohibitions will, subject to the condition that they are calculated to preserve the estate, be enforced according to their tenor.¹⁷²

3. MANSION-HOUSE.

Mansion-house.

In old entails it was not uncommon to except the mansion-house or mansion-houses and their accessories from express powers of leasing; and, even without such exception, this part of an entailed estate, as in other matters,¹⁷³ is treated in a way different from that in which the bulk of the estate is administered. Whether on account of the expediency of residence at the seat of the old heritable jurisdiction, or in conformity with the old view that the Act of 1449 (hereinafter to be frequently referred to) did not apply to buildings,¹⁷⁴ the rule has all along been that a contract of lease of a mansion-house or its accessories, or both, is purely personal and must be limited by the tenure of the granter.¹⁷⁵ In entire consistency with this rule and practice, the ordinary statutory powers of leasing, conferred by the Rosebery Act, are not applicable to 'the home farm, mansion-house and offices, garden, lawn, park or policy attached thereto, except to the extent of the granter's lifetime.'¹⁷⁶ Further, the power to grant Montgomery leases does not extend to letting 'the manor-place, office-houses, gardens, orchards, or enclosures adjacent to the manor-place, which have usually been in the natural possession of the proprietor or have not been usually let for a longer term than seven years when the heir in possession was of lawful age,' and land cannot be let for buildings within 300 yards of a manor-place usually in the natural possession of the proprietor.¹⁷⁷ Similarly the mansion-house, offices, and policies are withdrawn from the powers to grant long leases conferred by the Rutherford Act;¹⁷⁸ and the garden, orchards, policies, and enclosures adjacent to, or in connection with, the manor-place, in so far as they are necessary to the amenity of the manor-place, are excepted from the powers of granting long building leases conferred by the Entail Act of

¹⁷¹ See *infra*, p. 73, the right of a life-renter.

¹⁷² *Moir v. Graham*, 1826, 4 S. 730 (N.E. 737); *Boyd, supra*, ¹⁶⁵.

¹⁷³ See Rankine, Landownership, 594.

¹⁷⁴ Authorities in Sandford, Entails, 279, note.

¹⁷⁵ *Cathcart v. Schaw, supra*, ¹⁶⁶; *Leslie*

v. Orme, 1779, M. 15530, 2 Hailes 832, aff. 2 Pat. 533.

¹⁷⁶ 6 & 7 Will. IV. c. 42, sect. 1.

¹⁷⁷ 10 Geo. III. c. 51, sect. 6; *Turner v. Turner*, 6 Dec. 1811, F.C. 363.

¹⁷⁸ 11 & 12 Vict. c. 36, sect. 24; amended by 16 & 17 Vict. c. 94, sect. 6, and 45 & 46 Vict. c. 53, sects. 5, 6 (3).

1868.¹⁷⁹ So that if an heir of entail in possession desires to let the mansion-house or its appurtenances, or both, for a term beyond his lifetime, he must proceed either by obtaining a private Act or by obtaining the consents of all the heirs whose consent is necessary to a disentail.¹⁸⁰

II.—FEE AND LIFERENT.

A fiar burdened with a liferent cannot grant an effectual lease without the consent of the liferenter.¹⁸¹ But the power of a husband over his lands out of which an annuity has been granted, or over which a locality has been constituted, in favour of his wife, is not thus limited, both of these rights of the wife being eventual, and not in immediate enjoyment. In marriage-contracts there is generally inserted a power to lease these lands;¹⁸² but, independently, leases granted in the exercise of fair administration will be obligatory, notwithstanding the husband's decease.¹⁸³ Anciently a contrary doctrine was maintained,¹⁸⁴ but the rule was established after solemn consideration.¹⁸⁵ The exercise of the power must, however, be *in bonâ fide*; for a husband is not entitled to deprive his wife of her right of locality or liferent, in whole or in part, by deeds subsequent to her infetment, even though onerous, much less by gratuitous or fraudulent deeds. He cannot, therefore, under colour of a lease, alienate by letting at an undervalue and out of the course of due administration.¹⁸⁶

Powers of
fiar thus
limited.

As the right of a liferenter is purely usufructuary, he is only entitled so to possess as during his own life to reap the profits *salvâ substantiâ*.¹⁸⁷ Consequently he cannot grant a lease to endure longer than his own lifetime, whether he be a liferenter by reservation or by constitution only.¹⁸⁸ It will always be a question depending on the circumstances of each case whether

Powers of
liferenter.

¹⁷⁹ 31 & 32 Vict. c. 84, sect. 3, amended by 45 & 46 Vict. c. 53, sect. 6 (3).

¹⁸⁰ 11 & 12 Vict. c. 36, sect. 4; 38 & 39 Vict. c. 61, sect. 6; 45 & 46 Vict. c. 53, sect. 4.

¹⁸¹ 1 B.C. 62, note.

¹⁸² 1 Jurid. Styles, 5th ed. 199.

¹⁸³ 1 Bell, Leases, 104.

¹⁸⁴ Dir. and Steuart, 193, s. v. Liferenter.

¹⁸⁵ Cs. Moray v. Steuart, 1772, M. 4392, 1 Hailes 485, 5 B. S. 619; aff. 2 Pat. 317.

¹⁸⁶ Robertson v. Peter, 1777, 5 B.S.

619; Countess of Galloway v. Mackenzie, 1778, 5 B.S. 620; Laing v. Denny, 1827, 5 S. 903.

¹⁸⁷ St. 2.6.1, 4; Mack. 2.9.35; Bankt. 2.6.24, 26; Ersk. 2.9.39, 40, 56, 57; 2 Ross' Lect. 500; 1 B.C. 62.

¹⁸⁸ Balfour, 206; Cr. 2.9.9, 13; St. 2.9.9, Note by Brodie; Bankt. 2.6.34, 2.9.38; Ersk. 2.6.21, 2.9.57; 1 B.C. 62, note 5; B. Pr. 1057; More's Notes, 213; Lady Crawfordjohn v. Glaspen, 1611, M. 8252; Fraser v. Middleton, 1794, M. 8256, 7849.

the far on the lapse of the liferent has or has not adopted or homologated a lease taken for a longer period.¹⁸⁹

Liferenter's
management.

Notwithstanding the granter's death, a lease by a liferenter subsists until the ensuing Whitsunday.¹⁹⁰ At that term the lessee may be removed; ¹⁹¹ but he is entitled to possess until he is removed as accords of law.¹⁹² So long as there is no attempt to dilapidate the estate, and subject to this limitation in respect of endurance, a liferenter has a right to exercise the power of leasing in every respect as an absolute owner.¹⁹³ A widow, liferented in locality lands, is by the common style empowered to lease for her lifetime, or for nineteen years at a fair rent without grassum.¹⁹⁴ Where a contract of marriage, although limiting the amount of annuity, conferred to that extent a full right to the profits, the deed was held to confer a locality right, giving powers of leasing as ample as those of an absolute owner; and leases granted by the liferentrix were sustained, although the rent which might have been obtained upon new leases would have considerably exceeded the amount of her specific annuity.¹⁹⁵ From this decision, as well as from the absence of an interest to challenge, it follows that a liferenter may let at an undervalue for his own lifetime. A liferenter is entitled to alter the date of payment of rent so long as he does not thereby curtail the far's reversionary right. Thus, he may postpone payment of one-half of a year's rent from Martinmas to Whitsunday—the whole having been theretofore paid at the former term—and the change will make no difference in apportioning the rents between them.¹⁹⁶

Woods.

As in entail law so here, it is necessary to advert to certain specialties where the subject liferented contains timber or minerals. A liferenter being, in the ordinary case, entitled only to the fruit or produce of growing trees, and to underwood, ordinary windfalls, and, in so far only as required for the use of the estate, to ripe wood and extraordinary windfalls,¹⁹⁷ may find it convenient to let out this partial right along with, and as accessory

¹⁸⁹ Earl Marischall v. Tenants, 1630, M. 15215. Rossy v. Tenants, 1612, M. 15211, does not seem to be law.

¹⁹⁰ 1491, c. 26; Balfour, 458; Craig, Stair, and Bankt. *cit.* ¹⁸⁸; Ersk. 2.6.49; 2 Ross' Lect. 477; 2 Bell, Leases, 104; Thomson v. Merston, 1628, M. 8252; *infra*, chap. xxi.

¹⁹¹ Ersk., and Thomson v. Merston, *supra*, ¹⁹⁰.

¹⁹² Balfour, 206, 458; St. 2.9.9; Bankt. 2.6.34; Ersk. 2.6.49, Note (by Ivory),

133; Ross' Lect. *supra*, ¹⁹⁰; Winraham v. Henderson, 1621, M. 15212; Johnstone's Trs., 1803, M. 15207; Udney v. Brown, there noticed.

¹⁹³ Kames' Eluc. 60; Ersk. 2.9.56; B. Pr. 1181.

¹⁹⁴ 1 Jurid. Styles, 5th ed. 199.

¹⁹⁵ Pirie v. Murray, 1766, M. 8248.

¹⁹⁶ Gooden v. Chisholm, 1829, 8 S. 165.

¹⁹⁷ Authorities in Rankine, Land-ownership, p. 606.

to, a lease of the estate or part of it. But there is one case in which a lease of timber may stand by its own strength. Liferenters are entitled to cut coppice-wood if they be in possession when the customary period arrives for cutting, whether it recurs annually as to some part of the coppice (cut down on the system of 'haggs') or at longer intervals, and whether the liferent be by reservation or constitution.¹⁹⁸ Except as here stated, the right to timber rests solely in the fiar, unless there be some express extension of the liferenter's right.¹⁹⁹ The fiar may therefore, if not excluded from management by the intervention of a trust,²⁰⁰ let the timber, except so far as it is necessary for the comfortable enjoyment of the dwelling-house,²⁰¹ or for the recurring requirements of the estate.²⁰² Thus he alone is entitled to thin the woods and to let the right to do so. In every case where the liferenter's rights might be affected by a lease or by anything done in virtue of a lease, intimation should be made to him.²⁰³

It seems to be settled, after some doubt in our earlier law,²⁰⁴ Minerals. that a liferenter by constitution of a specific subject has no right to minerals, whether a mine be open or not when his right emerges, and therefore no right to let them out.²⁰⁵ Probably, however, a liferenter by reservation will be entitled to carry on going mines, at least if there be no risk of exhaustion, at the normal rate of working.²⁰⁶ Minerals required for the use of the mansion-house or estate may be taken by any liferenter, and the right may be transmitted in leasing out either of these subjects. In other respects the fiar is alone in right, and may let out the minerals without having to fear any interference on the part of the liferenter.²⁰⁷ But he may render himself liable to the

¹⁹⁸ *Dickson v. Dickson*, 1823, 2 S. 152 (N.E. 138); *M'Alister's Trs. v. M'Alister*, 1851, 13 D. 1239, reverting to the law in *Crs. of Mousewell v. Children*, 1683, M. 8253, 4 B.S. 138, and ignoring the distinction made in *Ferguson v. Ferguson*, 1734, M. 8254, *Elchies (Liferenter)* 1; *Gray v. Seton*, 1789, M. 8250, *Hailes* 1067; and *Lang v. D. Douglas*, 1752, M. 8246.

¹⁹⁹ *Dingwall v. Duff*, 1833, 12 S. 216, 541.

²⁰⁰ *Tait v. Maitland*, 1825, 4 S. 247 (N.E. 253).

²⁰¹ *Dickson v. Dickson*, ¹⁹⁸, and *Tait v. Maitland*, ²⁰⁰.

²⁰² *Stanfield v. Wilson*, 1680, M. 8244.

²⁰³ See *Ds. Hamilton v. Duke*, 1723.

Robertson App. 443; *Dingwall*, ¹⁹⁹, *Tait*, ²⁰⁰.

²⁰⁴ *Cr.* 2.8.17; *Dirl. and Steu.* 28, 29; *St.* 2.3.74. See *Preston v. Preston*, 1677, M. 8242.

²⁰⁵ *Ersk.* 2.9.57; *Bankt.* 2.6.6; 1 B.C. 61; *B. Pr.* 1042, 1070; 2 *Sandf. Succ.* 120; *La. Lamington*, 1682, M. 8240; *Preston*, *supra*, ²⁰⁴; *Belschier v. Moffat*, 1779, M. 15863; *Swinton v. Ds. Roxburghe*, 1 Feb. 1814, F.C. 532; *Dickson v. Dickson*, *supra*, ¹⁹⁸; *Wardlaw v. Campbell*, 1882, 9 R. 725, aff. 10 R.H.L. 65, 8 *App. Cas.* 641.

²⁰⁶ *Eiston v. Eiston*, 1831, 9 S. 716.

²⁰⁷ *Lamington*, ²⁰⁵, *Dickson*, *supra*, ¹⁹⁸; *D. v. Ds.-Dow. of Roxburghe*, 19th Jan. 1816, F.C. 65.

latter for surface damages and for undue interference with the enjoyment of the life-rented subject.²⁰⁸ And these rules may be overturned by proof of a contrary intention where intention is allowed to have any influence, and especially in the case of life-rents constituted by *mortis causâ* disposition.²⁰⁹

III.—JOINT AND COMMON RIGHTS.

The last limitation of power to grant or take leases is that which is involved in the fact that the lessor has a joint or common property in the subject let, or the lessee is only one of two or more parties acquiring a joint or common right. It will be convenient to consider separately cases into which the element of partnership or joint-stock association does not, and cases into which it does, enter.

A. APART FROM PARTNERSHIP.

Lessors who
are common
proprietors.

The leading rule is that, common property being a right of ownership vested *pro indiviso* in two or more persons, all of whom are equally entitled to enjoyment, the consent of all is requisite in the management or disposal of the subject.²¹⁰ Joint-ownership differs from common property only in certain respects,²¹¹ which have nothing to do with the management of the joint-estate so long as the community lasts. It will, therefore, be useful to ignore the distinction in what follows. The rule above laid down is otherwise described in the brocard—*In re communi melior est conditio prohibentis*²¹²—importing an absolute veto competent to each common proprietor, however small his interest may be.²¹³ All must concur in the granting of a lease,²¹⁴ in sequestrating a tenant,²¹⁵ and in removings. Thus a removing could not go on without the consent of all the proprietors, though one only of them had been in use to let, and had in fact alone let the subject.²¹⁶ His delegation, tacit or express, did not extend so far. Where of four common proprietors, one acted in granting the lease for himself, for two others as their mandatary, and for the

²⁰⁸ Roxburghe, ²⁰⁷ Dickson, *supra*, ²⁰⁵.

²⁰⁹ Waddell v. Waddell, 21st Jan. 1812, F.C. 481; Guild's Trs. v. Guild, 1872, 10 M. 911; Wardlaw v. Wardlaw's Trs., 1875, 2 R. 368; Ferguson v. Ferguson's Trs., 1877, 4 R. 532; Wardlaw v. Campbell, *supra*, ²⁰⁵.

²¹⁰ B. Pr. 1072.

²¹¹ Cargills v. Muir, 1837, 15 S. 408; McNeight v. Lockhart, 1843, 6 D. 128, 136; Lawson v. Leith, &c., Packet Co., 1850, 13 D. 175, St. 2.3.41; Ersk. 3.8.35;

B. Pr. 1882; 2 B.C. 500, 544; 2 Bell, Conv. 785.

²¹² 28 D. (10.3); 8, 27, § 1 D. (8.2); 11 D. (8.5); St. 2.9.43; Ersk. 2.6.53; 1 B.C. 63; 2 Bell, Leases, 60; B. Pr. 1074.

²¹³ Bruce v. Hunter, 16th Nov. 1808, F.C. 5 (1-71st part).

²¹⁴ Campbell v. Campbell, 24th Jan. 1809, F.C. 100.

²¹⁵ Steward v. Wand, 1842, 4 D. 622.

²¹⁶ Murdoch v. Inglis, 1679, 3 B.S. 297.

fourth (who was abroad and took no part in the management) as his *negotiorum gestor*, the two mandants were not entitled to remove the tenant without the concurrence of any representative of the mandatary, who had died in the interval.²¹⁷ But the rule is modified in two directions. The defence would not be listened to if tendered by a mere squatter, occupying without semblance of right.²¹⁸ And one of several common adjudgers seems to be entitled to pursue a removing, provided he offers a more solvent tenant or a higher rent,²¹⁹ or finds caution to his fellows for the rent, so far as their interest is concerned.²²⁰

A common or joint lease creates a common or joint right, entitling each lessee, unless it be otherwise arranged, to insist on joint possession and management,²²¹ and involves common or joint liability—an obligation *in solidum* to pay the rent and perform the other prestations due from a lessee—such as those arising out of tacit relocation.²²² No immunity is inferred by non-occupation.²²³ If the lease be common, each lessee has a distinct right in his *pro indiviso* share, transmissible by succession²²⁴ (subject to any clause of survivorship), or, if it be otherwise competent, by assignation.²²⁵ If the lease be joint—of which a lease to trustees is the most familiar example—there is no separate estate, but one estate vested in all, with right of survivorship.²²⁶

The principal questions which have arisen in regard to such leases have been raised with respect to the interpretation of destinations to heirs. Passing by a decision²²⁷ which shows that such destinations are amenable to the rule, *falsa demonstratio non nocet*,—it will be found that there is a difference in the legal effect of a common lease, according as it is taken, to A and B and their heirs; or to A and B, the longest liver, and their heirs; or to A and B in conjunct fee and liferent, and to their heirs. In all these cases, however, the rule holds that the destination will be read as part of a contract, and will not be governed by the special rules which are applicable to destinations in dispositions of land, and which result from the feudal principles that the

Joint lease to individuals.

Destinations in these.

²¹⁷ Grozier v. Downie, 1871, 9 M. 826.

²¹⁸ See Johnston v. Craufurd, 1855, 17 D. 1023; Lade v. Largs Baking Co., 1863, 2. M. 17.

²¹⁹ A. v. B., 1680, M. 2448.

²²⁰ Halliday v. Bruce, 1681, M. 2449.

²²¹ Dickson v. Dickson, 1821, 1 S. 113, 2 S. 462.

²²² Brown v. Paterson, 1704, M. 14629.

²²³ Sutherland v. Robertson, 1736, M. 13979.

²²⁴ Dickson v. Dickson, *supra*, ²²¹.

²²⁵ Gray v. Rollock, 1570, M. 4246.

²²⁶ See Cargills v. Muir, 1837, 15 S. 408, and other authorities in note ²¹¹, *supra*, p. 74.

²²⁷ Moore v. Boddan, 1823, 2 S. 583 (N.E. 501).

fee cannot be *in pendente*, and that of spouses the husband is the *dignior persona*.²²⁸ Where the meaning of the destination as it stands is unquestioned, and action is brought for the purpose of getting behind it and showing that the lease was really granted for behoof of one of the lessees²²⁹ or of a third party, this is really an attempt to prove a trust, and the only admissible evidence will be the writ or oath of the party or parties maintaining the *prima facie* interpretation of the words used.²³⁰

Lease to two lessees and their heirs.

(a) If the lease be taken to A and B and their heirs, each lessee has during life an equal interest both in kind and in degree, and upon the death of either his right devolves, not to the survivor but to his own heirs.²³¹ The assumption in an old decision²³² that there was an exception in the case of conjoint right to a father and his lawful son, by virtue of which the son succeeded to the whole interest after the father's liferent of the whole had lapsed, would probably not be given effect to in modern times. And the rule seems to be in full force, even where the conjoint parties are husband and wife.²³³

Lease to two lessees and the survivor and their heirs.

(b) If the lease be granted to A and B and the longest liver and their heirs, the right is common during their lives, with accretion to the survivor. Each during his life is vested with a right so qualified, that were he to assign his portion the assignation would terminate with his life, when the survivor acquires the sole right.²³⁴ No acquiescence in, or adoption of, any alteration in the rule thus established will be inferred from such facts as that for convenience the holding was divided, each tenant possessing and paying rent and taxes for one-half only, and that an assignee of the predeceaser possessed the half thus vacated for more than a year after his author's death, paying the rent and getting his name entered in the landlord's rental book—whether with the survivor's knowledge or not did not matter.²³⁵ The rule

²²⁸ *Forrester v. Milligan*, 1830, 8 S. 992; *Macalister v. Macalister*, 1859, 21 D. 560; *L. Boyd v. King's Adv.*, 1749, M. 4205; 5 B.S. 777; *Bankt.* 2.9.49.

²²⁹ *M'Vean v. M'Vean*, 1864, 2 M. 1150.

²³⁰ *Seth v. Hain*, 1855, 17 D. 1117.

²³¹ 1 Bell, *Leases*, 146; *Douglas v. Graham*, 1566, M. 4245 (mother and son); *Dickson v. Dickson*, ²²¹.

²³² *Douglas v. Graham*, ²³¹.

²³³ The case in *Balf.* 201 (1561), is ambiguously noted, but the rule was

observed in *Forrester v. Milligan*, ²²⁸, where the specialties founded on showed nothing more than that the conduct of the parties was consistent with the plain meaning of the lease.

²³⁴ 1 Bell on *Leases*, 147-8; 2 Ross' *Lect.* 487; *Gray v. Rollock*, *supra*, ²²⁵; *Lidderdale*, 1627, M. 4247; (*Bankt. ut supra*, ²²⁸, seems to have mistaken the import of this case as well as its name).

²³⁵ *Robertson v. Menzies*, 1857, 19 D. 667 (heirs of *survivor* expressly called).

applies in full force to the case where the common tenants are husband and wife. The heir of the survivor succeeds, though the survivor be the wife.²³⁶ The wife's right being presumably onerous, being obtained by contract from a third party, and being such, in any case, as not to make the husband *pauperior*, cannot be displaced by the husband directly or indirectly as a *donatio inter virum et uxorem*.²³⁷ If the heir of the spouses named in it be a party to the lease, especially if he was *sui juris* at its date, his right will be, not a mere *spes successionis*, but a *jus quæsitum* under contract, and therefore not liable to be defeated or affected by any deed (such as a sublease) granted by his parents, and taking effect beyond their lives.²³⁸ The rule is not affected by the circumstance that the marriage has been ultimately dissolved by divorce, and that the survivor is the guilty party.²³⁹

(c) If a lease be made 'to A and B in conjunct fee and liferent, 'and to their heirs,' the right of each is a right *pro indiviso*, burdened with the eventual liferent of the other over the whole subject, and assignable or adjudgeable only under that qualification.²⁴⁰ But the terms 'fee and liferent' in correlation are not properly applicable to leasehold rights.²⁴¹

Lease to two in conjunct fee and liferent and their heirs.

B. PARTNERSHIPS AND COMPANIES.

1. As Lessors.

Since unincorporated private companies or partnerships cannot hold feudal property in the social name, it must remain in the name of the partner who contributed it, or the title be taken in the names of the whole partners or of trustees for them.²⁴² There is no such limitations in the case of corporations, including joint-stock companies under the general statutes in that behalf. Leases in each case should be granted by the parties in whose name the title stands; and care should be taken to be assured that the transaction is not *ultra vires* of the parties actually concerned in the letting.²⁴³

Partnerships and companies as lessors.

²³⁶ Decided in *L. Boyd v. King's Adv.*, *supra*, ²²⁸, and assumed in *Gillon v. Muirhead*, 1775, M. 15286, overruling *Rig v. N. Tenants*, 1561, M. 4197, Balf. 201.

²³⁷ *Craigmillar v. Nisbet*, 1638, M. 6089; *Fraser, H. and W. ii.* 925; but see *L. Glenlee's obs. in Forrester v. Milligan*, *supra*, ²²⁸.

²³⁸ *Macalister v. Macalister*, *supra*, ²²⁸.

²³⁹ *More's Notes*, 250; *Cs. of Argyle v. E. Argyle*, 1573, M. 327.

²⁴⁰ 1 B.C. 64; and case of *Brown*, 1789, *there*.

²⁴¹ *Macalister*, *supra*, ²²⁸, *per L.J.-C. Inglis*.

²⁴² 2 B.C. 614, 619; *Denniston v. M'Farlane*, 1808, M. App. Tack, 15; but see 18 & 19 Vict. c. 88.

²⁴³ See case of *mutual leases*—the contribution of each partner to the concern, *Warner v. Cunninghame*, 1798, M. 14603, 3 Dow 76.

2. *As Lessees.*

As lessees.

A lease taken for behoof of a partnership or company²⁴⁴ may run in the name of the partners or any of them, or of a third party in trust; or in the name of the partnership, if it be a firm name, not merely a descriptive title; or of the corporation, if the company be incorporated.²⁴⁵ Any partner of a firm may bind it by accepting a lease in the firm name, provided his act is one which comes within the scope of the partnership business.²⁴⁶ Leases so taken become part of the common stock—held for the common use, affectable for payment of the partnership debts, and saleable for the common purposes.²⁴⁷ And the benefit of leases may accrue to the partnership, though intended by the lessee for his own behoof. Thus, 'it will not be permitted to a partner by dissolving a partnership to secure the benefit of a lease held by the company and about to expire;' ²⁴⁸ or to renew in his own name, a lease which belonged to a partnership which was approaching its stipulated term of endurance.²⁴⁹

Effect of dissolution.

With the dissolution of a company in whose name a lease has been taken, the lease lapses. Bankruptcy therefore (if assignees and subtenants are excluded) by dissolving the company terminates the lease.²⁵⁰ Dissolution by death, mutual consent, or any other cause, must produce the same effect.²⁵¹ There is no necessary connection between the endurance of the partnership and of a lease which is one of its assets.²⁵² If any part of the term of a lease granted to a company is unexpired at the dissolution of the partnership, it is partnership estate, and is to be distributed as such.²⁵³ Where, therefore, a company has been dissolved, and the partners cannot agree as to the disposal of the lease of the premises in which they carried on trade, it has to be exposed to sale.²⁵⁴ The rule applies, though the lease be not taken *socio nomine*, if it be held for the common benefit. Where, consequently, the partners of a company in the pro-

²⁴⁴ In addition to the following brief sketch, it will be enough to refer to the many well-known treatises on company and partnership law.

²⁴⁵ *Murray v. Hogarth*, 1835, 13 S. 453; *Denniston v. M'Farlane*, *supra*, ²⁴²; 2 B.C. 627; 1 Bell, Leases, 149; B. Pr. 357; *More's Notes*, 101.

²⁴⁶ 2 B.C. 617. See cases in 1 Lindley, 648, of leases by a partner to his firm.

²⁴⁷ 2 B.C. 612.

²⁴⁸ 2 B.C. 632, and authorities there; 1 Lindley, 574.

²⁴⁹ *Featherstonhaugh v. Fenwick*, 17 Ves. Junr. 298.

²⁵⁰ 1 B.C. 82; *More's Notes*, 268; 1 Bell, Leases, 150; *Campbell v. Calder Iron Co.*, 1805, in 1 B.C. 82.

²⁵¹ See *Gillespie v. Clark*, 1821, 1 S. 160 (N.E. 153).

²⁵² *Crawshay v. Maule*, 1 Swanst. 509.

²⁵³ *Per Sir William Grant, M.R.*, in *Featherstonhaugh v. Fenwick*, *supra*, ²⁴⁹.

²⁵⁴ 2 B.C. 631 note, 632 note; *Marshall v. Marshall*, 23rd Feb. 1816, F.C. 101.

secution of its business have obtained a lease in favour of themselves individually, and their assignees or sublessees, and the company is afterwards dissolved by the death of one of the partners, the survivor is bound to concur with the representatives of the deceased in a sale of the lease as a part of the company stock.²⁵⁵ And, on the same principle, a lease having been taken in the joint names of two individuals with the view of entering into a partnership, and that purpose having been broken off, it was decided that one of the parties was not entitled to resist an application for sale of the lease and for his removal from the premises.²⁵⁶

IV. LEASEHOLD.

The power of a lessee to sublet and the limitations involved in the restricted character of his title find a more convenient place in a subsequent chapter.²⁵⁷

²⁵⁵ *Aitken's Trs. v. Shanks*, 1830, 8 S. 753.

²⁵⁶ *M'Whannell v. Dobbie*, 1830, 8 S. 914.

²⁵⁷ Chap. ix.

CHAPTER III.

THE SUBJECTS LET.

THE proper subjects of the contract of lease are land and other corporeal heritable property, such as buildings. But by an obvious extension the term is applied to the temporary transfer of certain incorporeal rights—such as the right to the use of water, fishings, and game—which are intimately connected with the land. Questions have arisen as to the propriety of applying the rules of leasehold to certain subjects. On account of the exhaustive character of the possession, it has been frequently maintained that a temporary right to take mines or timber is more of an executory sale than a lease; yet the nomenclature is fully established.¹ The right to kill game or other animals *feræ naturæ* is to such an extent a right to the occupation of land for a special purpose, that no lawyer need be ashamed of using the popular expression—game lease. The definition, with which this work started, is sufficient to exclude from the category of leasehold the temporary communication of such continuing rights as offices, customs, and the like.²

In the following remarks an attempt will be made not to forestal, as to any special subject, that explanation of the general rules governing the contract of lease, which will occupy the rest of the work. Passing by for the moment the ordinary subjects of lease (lands and buildings), it will be enough to explain, or enable the reader to discover for himself, the special characteristics which attach to certain other subjects, in so far as these characteristics are pertinent to the present inquiry.

1. MILLS AND MULTURES.

The only reason for separate mention of mills—*i.e.*, grist-mills—in treating of leases of heritable subjects, is that along

Mills and
multures.

¹ See *Muirhead v. Drummond*, 1792, in 2 B.C. 28; *Stewart v. Stewart's Exrs.*, 1761, M. 5436; *Campbell's Exrs. v.*

Campbell, 1743, M. 5427; *Campbell v. Grant*, 1827, 6 S. 188.

² *Infra*, p. 83.

with the fabric there may be let the advantages derivable from the astringency of lands by the pseudo-servitude of thirlage; whereby the occupiers of these lands are bound to resort to the mill for the manufacture of their grain at rates—called multures, sequels, and services—regulated by ancient compact or by prescription, and not by the market value of the process. The law of thirlage has been so fully treated in works which are in the hands of all lawyers; so little has been added to the doctrine in recent times; and the burden itself has so nearly died out all over the country, that it would unnecessarily encumber this treatise to do more than add a reference to the authorities.³

2. MINERALS.

A considerable controversy has raged both in Scotland and Minerals. England as to the meaning of the words 'mines, minerals, and 'quarries,' when used in dispositions of subterranean substances. The question has chiefly arisen where there has been a reservation made by one who is proprietor of land '*a celo usque ad centrum*' in disposing the surface.⁴ In leases for the working of minerals, there is invariably a detailed description of the subject let; and an interpretation of the general terms is therefore not likely to arise as between landlord and tenant. If the question is whether a particular seam or sort of mineral be or be not described by or included under the name of a substance mentioned specifically in a lease, the point is matter of fact, not of law, and should be sent to a jury.⁵ The transmissible right, formerly existing, to the services of colliers and salters as serfs was abolished in last century.⁶

3. FISHERIES.

The limitations under which fisheries of salmon, trout, oysters, Fishings. mussels, lobsters, and other kinds of fish may be carried on, and the respective rights of the Crown, the landowner, and the public, have been so fully set forth in works which treat of fishery and ownership,⁷ that it would be out of place to reiterate what is

³ Cr. 2.8.6-12; Forbes, 2.4.3.1.5; St. 2.7.15-27; More's Notes, 225; Mack. 2.9.15-30; Bankt. 2.7.38-61; Ersk. 2.9. 18-32, 38; B. Pr. 1016-36; 1 Hunter, 248-259; 39 Geo. III. c. 55. Add cases in 9 S. 244; 9 S. 763; 6 W. and S. 98; 1 M. 833; 11 M. 530; 8 R. 514. As to a cognate monopoly, see E. Elgin's Trs. v. Walls, 1833, 11 S. 585.

⁴ Cases collected in Rankine on Landownership, pp. 147 *et seq.*; Mags. of Glasgow v. Farie, 21st Jan. 1887, 24 Sc.L.R. 253.

⁵ Gillespie v. Russel, 1854, 17 D. 1, 18 D. 677, 19 D. 897; 3 Macq. 757; 21 D. (H.L.) 13 (whether the Torbanehill mineral was coal).

⁶ 15 Geo. III. c. 28; 39 Geo. III. c. 56.

⁷ B. Pr. 646, 671, 739, 1112, 747, 1100, 1224; Stewart on Fishing, *passim*; Rankine on Landownership, 257 *et seq.*, 765, 768, 777 (salmon); 295, 350, 875 (trout); 215, 226 (oysters and mussels); 228 (lobsters).

there stated. It is enough to remark here that whatever continuing right a fishery owner may possess he can communicate by way of lease. Questions may arise, however, whether a privilege of fishing reserved by him in a grant of fishings is of such a nature as to be assignable and communicable, or to be only personal to himself.⁸

4. *Kelp-shores.*

Kelp-shores.

The right to cut seaware for the manufacture of kelp is a right distinct from that of the agricultural or pastoral tenant of seaboard lands, and is not presumed to be let out with these lands.⁹ It may constitute a separate holding, and, as a matter of fact, leases of 'kelp-shores'¹⁰ were not uncommon during last century and part of the present century, till the use of kelp was superseded by that of barilla in the manufacture of soda, and the burning of kelp was given up as unremunerative.

5. *Steam and Water Power.*

Steam and water power.

The questions which have arisen with reference to leases of factories along with a supply of steam-power, or to the letting of steam-power as a separate subject, will be elsewhere noticed.¹¹ And illustrations of the general rules of interpreting leases are to be found in cases relating to the composite contract.¹² What is compendiously known as a lease of water-power presents no peculiarity requiring notice in this place.¹³

6. *Tolls.*

Tolls.

Tolls on roads are now abolished.¹⁴ General powers are given to canal companies to lease out their tolls for not more than twenty-one years.¹⁵ But canal companies which are also railway companies are under special restraints for the prevention of monopolies.¹⁶

7. *Railways.*

Railways.

Leases of railways are so purely the creatures of special statutes,¹⁷ and, on account of the peculiarity of their subject matter, are so widely different from leases of other subjects, that

⁸ *Gemmill v. Riddell*, 1847, 9 D. 727; *D. Richmond v. Duff*, 1867, 5 M. 310 (reservations of privilege of angling).

⁹ *Campbell v. Campbell*, 1795, M. 9646.

¹⁰ *Sinclair v. M'Beath*, 1788, Hume 773.

¹¹ *Esp. infra*, chap. xvi.

¹² *Stewart v. Clark*, 1871, 9 M. 616; *Wilson v. Norris*, 10th March 1810, F.C. 624; *Walker v. Turnbull*, 1843, 5 D. 1334.

¹³ Examples—*Robertson v. Gibson*,

1761, M. 12799; *Stirling v. Dunn*, 1827, 6 S. 272, aff. 3 W. and S. 462; *Henderson v. Stewart*, 1818, Hume 522, 15 S. 868; *Gall v. Muirkirk Iron Co.*, 1850, 12 D. 622; *Sawers v. M'Connell*, 1874, 1 R. 392.

¹⁴ 41 & 42 Vict. c. 51, sect. 33.

¹⁵ 8 & 9 Vict. c. 42, sects. 8-12.

¹⁶ 21 & 22 Vict. c. 75, sect. 3; 23 & 24 Vict. c. 41; 36 & 37 Vict. c. 48, sect. 16 (annually renewed).

¹⁷ 8 & 9 Vict. c. 33, sects. 105, 106; 8 & 9 Vict. c. 96.

it will be convenient in this work simply to refer to well-known treatises on railway law,¹⁸ wherein the circumstances which induce the legislature to sanction or veto an arrangement whereby one line is virtually absorbed in another, and the conditions on which such an absorption is allowed are duly set forth in detail. It would be out of place to do more in a general treatise on landlord and tenant, which cannot diverge (as would be necessary to a full exposition of the subject) into the cognate rules relating to amalgamation and working agreements. As might be expected, the cases which have come before the Courts do nothing to illustrate the general doctrines of leasehold.¹⁹

8. *Ferries.*

Leases of rights of ferry have long been recognised and enforced in our law.²⁰ They usually include the use of the vessels or boats and their appurtenances, as well as of the requisite piers and landing-places, and sometimes also of a ferry-house and croft for residence.²¹

9. *Dues.*

Leases of harbour-dues, burgh-customs, and such like imposts, usually taken from year to year, are more properly contracts of pure location.²²

10. *Rents, &c.*

Leases of the right to draw rents, feu-duties, casualties, dues of office, and such like annual or periodical prestations²³ are now rare, and, where they are not in reality assignments in the proper sense of the word, are usually collusive transactions entered into for some purpose which may²⁴ or may not be²⁵ so tainted with illegality as to be altogether void. The rights so let or assigned are usually associated with lands and other heritable subjects, forming together with these the *universitas* of the grantor's estate.

¹⁸ Deas, p. 117; Hodges, pp. 10, 28, 513, 531; Browne and Theobald, 293, 322, 337, 440, 445.

¹⁹ The Scotch cases are to be found in 10 D. 215, 1317; 11 D. 1395; 12 D. 37, 834, 989, 1014; 14 D. 747; 15 D. 523, and (H.L.) 48; 17 D. 1148, and 22 D. (H.L.) 1; 18 D. 1230; 19 D. 598; 1 R. (H.L.) 1; 5 R. 995; 9 R. 510.

²⁰ Rankine on Landownership, p. 254, as to the nature and comprehension of the right; Taylor v. Brown, 1800, Hume 308,

²¹ See Baillie v. Hay, 1866, 4 M. 625.

²² Cases in 1 Hunter, 328.

²³ Balf. 200-208; Cr. 2.10.2; St. 2.9.3; Bankt. 2.9.1; Ersk. 2.6.27; 2 Ross' Lect. 488, 504; Gordon v. Forbes, 1774, M. 15221.

²⁴ See *Bs. Mordaunt v. Innes*, 9th March 1819, F.C. p. 679, aff. 1 Sh. Ap. 169; *Innes v. D. Gordon*, 1827, 6 Sh. 279.

²⁵ *L. Cathcart v. Schaw*, 1755, M. 15403, 5 B.S. 816, aff. 1 Pat. 618; *Bruce v. Assessor for Zetland*, 1882, 10 R. 34,

CHAPTER IV.

CONSTITUTION AND PROOF OF THE CONTRACT.

I.—GENERAL RULES AS TO CONTRACTS, ILLUSTRATED FROM LEASES.

A lease is a contract, and is therefore subject to all the general rules applicable to contracts. Illustrations of some of these will appear *passim* during the course of this treatise. It will be well, however, to refer here to a few cases (not adequately noticeable elsewhere) in which the elementary principles of contract law have received striking illustration in modern times.

*Consensus
in idem
placitum.*

1. There must be between the parties *consensus in idem placitum*. Their minds must have come into agreement, not merely apparently, but really; otherwise there is no contract. Thus, where, after a draft lease had been adjusted between the parties, the lease as extended and signed by the tenant contained a new and material clause, and the landlord in consequence refused to sign, there was held to be no concluded contract, and therefore no room for an action of damages for non-implement or for certain expenditure incurred on the faith of the transaction but not till after warning.¹ An offer was made for a farm by letter to the landlord, whose agents sent a draft lease for revision, and three months later got it back to be extended. They then proposed to insert a further condition and also certain stipulations verbally agreed on in this interval. It was held that there never was agreement, even to the effect of setting up a completed contract by *rei interventus*.² Again, a person in bargaining for a farm believed the contract between him and the landlord to include certain terms stipulated for by him in an earlier, as well as those contained in a later, offer, neither of which was formally accepted by the landlord. The latter believed that the whole bargain was contained in the second offer. The

¹ *Dallas v. Fraser*, 1840, 11 D. 1058 *v. Gerrard*, 1833, 11 S. 737.
(there was no *rei interventus*). See Cairns

² *Fraser v. Brebner*, 1857, 19 D. 401.

possession, which lasted for two years, did not show on what footing it proceeded. Even after that lapse of time it was held that there was no contract, and that the tenant must remove, reserving all claims that might be competent to him in connection with his possession of the farm.³ But in such cases the discrepancy must be real and not merely formal, and therefore it was no valid objection that an offer of a lease of 'corn and flour-mills, ' and pigs'-houses and boilings' was accepted as 'your offer for ' my mill;' and that the acceptance bore to be 'subject to a ' lease drawn out in due form.'⁴ A provision that certain moveables were to be taken over by the tenant at entry conform to inventory appended to the lease and signed, was held to be only an obligation of the lease and not a suspensive condition, though no possession had followed and no inventory had been prepared or signed.⁵

Distinction between incomplete contract and breach of a covenant.

2. A lease, like any other contract, which is tainted with Fraud. fraud, is voidable. Where a body of trustees were induced to execute a lease on the representation by the tenant's son, acting with the tenant's consent, that it was in exact conformity with an expiring lease of the same subjects, with the terms of which the son was acquainted, while in point of fact it was materially different, the lease was reduced as fraudulently obtained; and the question was left open whether reduction would have followed if the father had been ignorant of his son's fraud.⁶ An allegation of fraud may let in proof of material stipulations made at or about the date of the contract, although they do not appear in the lease itself.⁷ Neither party is bound to warrant every representation made to the other in transacting about a lease, or to reveal everything that might weigh with the other party in deciding whether or not to contract; there must be allegation and proof of *dolus dans causam contractui*, not merely of false representation.⁸ An advertisement offering a mineral field on lease set forth that it contained certain strata, and referred

³ D. Hamilton v. Buchanan, 1877, 4 R. 328, 854; aff. 5 R. (H.L.) 69; see also Waldie v. Gordon's Trs., 1867, 5 Sc.L.R. 40.

⁴ Erskine v. Glendinning, 1871, 9 M. 656 (remit to conveyancer to draw the lease).

⁵ Steuart v. Neilson, 1864, 2 M. 817.

⁶ Beresford's Trs. v. Gardner, 1877, 4 R. 363, 885, 1091; sequel in 5 R. 638. As to the last point see Clydesdale Bank v.

Paul, 1877, 4 R. 626. Issue in M'Neillie v. Cowie, 1858, 20 D. 1229.

⁷ Drummond v. Douglas & Co., 1851, 23 Sc. Jur. 648.

⁸ Oliver v. Suttie, 1840, 2 D. 514 (large discrepancy in acreage, see *infra*, p. 188). See M'Pherson v. Campbell's Trs., 1869, 41 Sc. Jur. 634, for form of issues, and Nisbet v. Kinnaird, 1698, M. 4872 (a gross misrepresentation of amount of prior rent, which would probably at the present day have been sent to a jury).

intending offerers to a mining-engineer named, for further information. On the faith of the advertisement and of the engineer's report a lease was entered into, but the tenant found on trial that there was no workable mineral in the field. It was held that in order to reduce the contract he must aver not merely false but fraudulent representation on the part of the landlord, or of persons for whose statements he was responsible.⁹ Similarly, it was decided in one branch of the *Torbanehill* case, that a case of fraud on the part of the mineral tenant was not properly set forth by the landlord, where it was merely founded on alleged concealment of the fact that the tenant, being in occupation of an adjoining field containing a peculiarly valuable mineral, had 'good reason to believe' that it existed also in the lessor's land, and on an alleged false representation, which in any view only came up to a statement, regarding a mineral field still to all intents and purposes untried, that the quality and value of the mineral was less than the tenant believed it to be.¹⁰ A fresh action was brought similar to the last, except that in lieu of the allegation averring 'good reason to believe' there was inserted an averment which was read as stating that the tenant had ascertained and knew at the date of the contract that the mineral in question existed in the field let to him. And the new record was sent to proof, with the approval of the House of Lords.¹¹ The right to challenge may be lost by *mora*, as where possession for ten years barred objection on the ground of misrepresentation as to the stock-carrying capacity of a farm.¹² The rule that a cautioner is entitled to a disclosure by the creditor of all facts material to the risk¹³ seems to have been ignored in one case, where the fact that a tacksman of tolls, for the rent of which caution was taken, was allowed to take them, contrary to the rules of the roup, while in arrear for toll-rent, was concealed, and was regarded by the Court as so immaterial as not to be worthy of being put in issue.¹⁴ That the lessor was only a creditor of the lessee with an *ex facie* absolute, but really redeemable, disposition as his title to the subjects let, both

Mora.

⁹ *Campbell v. Boswall*, 1841, 3 D. 639.

¹⁰ *Gillespie v. Russel*, 1856, 18 D. 677, (the tenant's representations fell much short of this on a fair construction); and see *Rig v. Durward*, 1776, M. 5672.

¹¹ *Gillespie v. Russel*, 1857, 19 D. 897, aff. 3 Macq. 757, 21 D. (H.L.) 13. (Some doubt was expressed in the House

of Lords whether the first action was not also relevant).

¹² *Grieve v. Rutherford's Trs.*, 1871, 9 Sc.L.R. 60.

¹³ See the limitations on the rule in Pollock on Contracts, p. 506, and cases there, some of them Scotch; Guthrie's B. Pr. 251.

¹⁴ *Burnett v. Burnett*, 1859, 21 D. 813.

heritable and moveable, is not a fact which has to be disclosed to a party becoming cautioner for the rent, though the result of the transaction be that there is no hypothec to fall back on.¹⁵

3. Both parties must be bound or neither; or, if there be more than two parties, all must be bound or none.¹⁶ Thus, where three persons agreed with a lessor to take a lease and to become jointly and severally liable for the rent, and two of them signed the extended tack in the absence of the third, who had gone to view the lands, these two were held not bound as lessees on the refusal of the third to sign. There was *locus pœnitentiæ* so long as any party to the transaction was not effectually bound, and it made no matter in whose custody the inchoate deed was kept.¹⁷ 'But, where a tack was set to a tenant and his son ' while under age, the tack was found effectual to the father ' against the granter, though the son did not subscribe it; ' because the faith of the father only appeared to have been ' followed, and the putting in the son's name to have been rather ' a concession to the father than a stipulation by the granter of ' the tack.'¹⁸

All parties bound.

4. A lease, being a mutual contract containing correlative rights and obligations, must be construed as a whole, each clause being taken in connection with all the others and with the common and statutory law of the land. Moreover, it must be so read as to bring out the intention of the parties so far as that appears on the face of the contract when thus interpreted, along with such extraneous evidence as may be competently adduced.¹⁹ The Courts have no bias either for or against the landlord or the tenant; and the only presumption admissible seems to be the general maxim that a deed shall be construed *contra proferentem*, against the party who had the drawing up of a deed to which the other only consented.²⁰ The doctrine that leases are *stricti* (even *strictissimi*) *juris*²¹ was imbedded in our jurisprudence at a time when a grant of a lease was regarded as a favour to a follower, rather than as a commercial transaction,

Principles of construction.

¹⁵ *M'Dougall v. Northern Assurance Co.*, 1864, 2 M. 935.

¹⁶ See *D. Hamilton v. Buchanan*, *sup.* 3; St. 1.10.16; B. Pr. 71, and cases there.

¹⁷ *York Buildings Co. v. Baillie*, 1724, M. 8435; see *Edenham v. Stirling*, 1634, M. 8408; *Hope v. Cleghorn*, 1727, M. 8409; *Paterson v. Bonar*, 1844, 6 D. 987;

Sinclair v. Weddell, 1868, 41 Sc. Jur. 121.

¹⁸ *Hamilton v. Smith*, 1738, M. 9168, per L. Kilkerran.

¹⁹ As to which see *infra*, p. 97.

²⁰ See *Johnston v. Gordon*, 1805, Hume 822, per L.P. Campbell.

²¹ Cr. 2.10.3; St. 2.9.26; Bankt. 2.9.11, 17; Ersk. 2.6.31; 2 Ross' Lect. 482; 1 Bell, Leases, 145.

and the only traces it has left behind are to be found in the rule of *delectus personæ*, which will be explained when treating of the lessee's succession and power to alienate.²² In other respects, a Scottish lease seems to be a contract *bonæ fidei*,²³ like the leases of ancient Rome and modern Europe.²⁴

Homologation. 5. There will be an early opportunity of stating the rules which regulate the form in which leases have to be constituted.²⁵ It is a general rule of contract law that voidable agreements may be set up, or objection cut off, by *mora* and homologation. Therefore, the receipt of rent by the heir of the granter of a lease for thirty-two years barred challenge on the ground of minority and lesion.²⁶ Payment of rent for three years has been held sufficient to stop the mouth of a tenant who complained of misrepresentation of the quality of the stone let to him in the tack of a quarry.²⁷ Receipt of rent is a recognition of a sublessee by the landlord,²⁸ if it be paid and received in that capacity, and not otherwise;²⁹ and the same is true of an assignee;³⁰ for in these cases all that is necessary to prove is that the landlord does not exercise his power to dissent from the new arrangement. It is different in cases where the landlord cannot get rid of a tenant without a process of reduction.³¹ Then it only shuts out recourse against the tenant for the estimated value of his possession during the past.³²

Receipt of rent.

Lease a personal or real right—rules common to both.

A lease is at common law merely a personal contract obligatory upon the parties and their representatives, but not upon singular successors.³³ So much is this the case, that a question between landlord and tenant involving the existence or non-existence of a

²² *Infra*, chaps. viii., ix.

²³ See opinions *obiter* to this effect by L. Balgray in *Smith v. Robertson*, 1831, 9 S. 751; by L. Cunninghame in *Ross v. D. Sutherland*, 1838, 16 S. 1179, and *Foulis v. M'Whirter*, 1841, 13 Sc. Jur. 150; and by L. Curriehill (I.) in *Wight v. E. Hopetoun*, 1858, 20 D. 955, 958; see also *per* L. Meadowbank in *Fraser v. Ewart*, 25th Feb. 1813, F.C. 223, and *Stirling v. Miller*, 29th June 1813, F.C. 416.

²⁴ See the references in 2 Hunter, 143, and Woodfall (13th ed.), 134.

²⁵ *Infra*, p. 89.

²⁶ *Hamilton v. Ly. Cardross*, 1712, Robertson's App. Cas. 37.

²⁷ *Rig v. Durward*, 1776, M. 5672.

²⁸ *Maule v. Robb*; *Hay v. M'Tier*, 1807, Hume 835.

²⁹ *E. Elgin's Trs. v. Walls*, 1833, 11 S. 585.

³⁰ *Aglionby v. Watson*, 1809, Hume 845.

³¹ *Ibid. per* L. Glenlee.

³² *E. Marshall v. Fraser*, 1633, 1 B.S. 339 (rentaller); *Home v. Taylor*, 1734, M. 5700; *Malcolm v. Bardner*, 1823, 2 S. 410 (N.E. 366), contravention of entail.

³³ Cr. 2.10.9; Dirl. 411; St. 1.15.4, 2.9.1, 3.2.6; Mack. Obs. 37; Mack. Inst. 2.6.6; Bankt. 2.9.1; Ersk. 2.6.23, 30; 2 Ross' Lect. 473; 1 B.C. 65; B.Pr. 1186; *Stewart v. Watson*, 1864, 2 M. 1414, 1422; *Campbell v. Mackinnon*, 1867, 5 M. 636, 644, 649, aff. 8 M. (H.L.) 40, 46.

lease may be competently tried by the sheriff, there being no real competition of heritable title, no proper conflict of heritable right.³⁴ But, by an old statute,³⁵ leases of certain sorts of subjects become real rights if they comply with certain requisites over and above what is required for the constitution of a personal contract. The scheme of the immediately following pages is to detail, in the first place, the rules relating to the constitution of all leases, whether they be real or only personal rights, and then to pass on to the scope and requirements of the statute.

II. CONSTITUTION OF THE CONTRACT.

The cardinal rule which governs the constitution of a contract of lease is 'that wholesome rule of our law which requires probative writings *hinc inde* to bind parties or either of them 'in any bargain concerning heritage.'³⁶ 'Leases, like other heritable rights, can be constituted only by probative writing, 'and this rule admits of no exception while matters are entire.'³⁷ As will be shown hereafter, one class of leases—those taken for a year or under—are exempted from the rule.³⁸ And, as will also be pointed out in the sequel³⁹ in cases where the rule applies, the conduct of the parties may preclude either of them from taking advantage of any informality in the constitutive deed or deeds, and thus in effect bind both as effectually as if no informality had existed. We proceed, in the first place, with the rule requiring probative writ, and how it is observed.

A lease, in the proper sense of the word, is a bilateral contract contained in one writing signed by both parties.⁴⁰ But it commonly happens that the formal deed is preceded by a record of the terms verbally adjusted between the parties, in the form of 'missives' or 'missive letters'—where the arrangement is set forth and concluded in more than one document—or of a

³⁴ *Robertson v. Cockburn*, 1875, 3 R. 21 (the question of competition of leasehold rights was reserved).

³⁵ 1449, c. 17.

³⁶ *Per* Baron Hume in reporting *Sproull v. Wilson*, 1809, Hume 920.

³⁷ *Walker v. Flint*, 1863, 1 M. 417, 421, *per* L.J.-C. Inglis; Cr. 2.10.10; St. 2.9.4; Mack. 2.6.5; Bankt. 1.11.23, and 2.9.5; Ersk. 2.6.30, and 3.2.2; B. Pr. 1190; and of recent cases, *Gowan's Trs. v. Carstairs*, 1862, 24 D. 1382; *Emslie v. Duff*, 1864, 3 M. 854; *Fowlie v. M'Lean*, 1868, 6 M. 254; *Gibson v.*

Adams, 1875, 3 R. 144; *Sinclair v. Caithness Flagstone Co.*, 1880, 7 R. 1117, var. 8 R. (H.L.) 78. The *dicta* of Lord Neaves allowing secondary evidence in *Exchequer*, are either not *contra*, or are bad law; *Adv.-Gen. v. Sinclair*, 1855, 17 D. 290 (the case was compromised).

³⁸ *Infra*, p. 103.

³⁹ *Infra*, p. 106.

⁴⁰ Each party should have a duplicate or a copy, *per* L.J.-C. in *Brown v. Coll.* of St. Andrews, 1851, 13 D. 1355. Discrepancy between duplicates lets in parole; *Grant v. Sinclair*, 1861, 23 D. 796.

'minute' of lease—where there is only one document privately arranged—or of articles of roup and subscribed offer—where the contract is arrived at by public auction.⁴¹ Lastly, there may be merely a promise to grant or take a lease, or a promise not to remove a sitting tenant before a given term, accepted according to the requirements of law.⁴² It frequently happens that the parties rest satisfied with the missives or minute or promise, without executing a more formal document. It has never been questioned that if the missives or minute set out a concluded contract, properly authenticated, this is a full equivalent to a formal lease, the frame of the contract being a matter of indifference to the law, and the same doctrine applies to a promise, obligation, or engagement to grant or take a lease or not to remove a tenant when taken along with a sufficient acceptance.⁴³ *Pactum de assedatione faciendâ et ipsa assedatio œquiparantur.*⁴⁴

Authentica-
tion thereof.

The same rule requiring formal authentication applies to these subsidiary or preliminary writs as well as to the more formal lease. Thus—at the risk of anticipating—it may be here stated that while a promise by a landlord of a year's tack,⁴⁵ or a promise not to remove a sitting tenant for a year,⁴⁶ can be proved by witnesses, a promise of either sort applicable to a longer⁴⁷ or to an indefinite⁴⁸ period can only be proved by writ or oath. Thus, a memorandum containing an obligation to grant a lease was held not to be of itself a title of possession, being only initialed on all the pages except the last, and lacking the testing-clause till after production in Court.⁴⁹ It seems to be the better opinion that such a promise for a lease for years or for an indefinite period cannot be proved by witnesses even to the extent of standing good for a year.⁵⁰ A promise to extend a lease by a year cannot be proved by witnesses if it is alleged

⁴¹ These writs may contain stipulations so various that it would serve no good purpose to attempt a detail of the usual clauses. It is enough to refer to 1 Hunter, 420.

⁴² Distinguish this from the somewhat unusual promise by landlord to treat for a lease; Cooper v. Leslie, 1825, 4 S. 33 (first and last offer).

⁴³ See cases in next paragraph.

⁴⁴ Cr. 2.10.10; St. 2.9.6; Bankt. 2.9.5; Ersk. 2.6.21; Garioch v. Forbes, 1750, M. 15177; Grant v. Richardson's Reps., 1788, M. 15180.

⁴⁵ Monteith v. Tenants, 1582, M. 8397;

see Charters v. M'Duff, 1567, *ibid.*

⁴⁶ Fraser v. Leslie, 1581, M. 12405.

⁴⁷ Johnston v. Logan, 1621, M. 8399; Laurie v. Kerr, 1630, M. 12736, 15169; Baillie v. Somerville, 1611, M. 8398; Power v. Customers, 1626, M. 8399.

⁴⁸ Low v. Lyell, 1611, M. 8398 (for life); Braco v. Innes, 1742, M. 15176 (so long as rent paid).

⁴⁹ Beresford's Trs. v. Gardner, 1877, 4 R. 885.

⁵⁰ Cf. Fowlie v. M'Lean, 1868, 6 M. 254; and Charters v. M'Duff, *supra*, ⁴⁵, with Baillie v. Somerville, *supra*, ⁴⁷; Low v. Lyell, *supra*, ⁴⁸.

by the promisee to be subject to some condition not usually contained in similar tacks, such as that caution should be found.⁵¹ Acceptance of a probative—but only of a probative—offer may be proved by possession, payment of rent, and other facts and circumstances, though these might not amount to proof of *rei interventus*.⁵² Thus, a lease was held to be constituted by possession following on a holograph letter from the landlord to the tenant letting a farm at a rent to be fixed by two other persons; and the duration and rent were proved by entries in the rental book of the estate, made by one of these persons who was judicial factor at the time.⁵³ The same doctrine would hold where the offer came from the tenant or a regular lease was signed by him, and he was allowed to possess and pay rent without objection.⁵⁴ In each case the offeree is entitled to hold the offerer bound immediately on receipt of the offer, and declares his intention by his conduct; there is no *locus pœnitentiæ*. It will in every case be a question of circumstances, turning mainly on a construction of these preliminary writs, whether the execution of a formal deed is or is not a condition precedent to a concluded bargain.⁵⁵ If it is not, the Court remits to a conveyancer to adjust the 'usual and necessary' clauses.⁵⁶

It would be out of place to touch on the conveyancing rules for the execution of documents, further than to point out that where the constitutive writ—a lease proper or a minute—is a single document, it must be tested; and that where the contract is to be found in two or more writings, each of these must either be tested or holograph of the granter, or of some one entitled to bind him in the matter. In regard to these rules of con-

Rules of conveyancing.

⁵¹ Jackson v. Graham, 1705, M. 12413.

⁵² See *infra*, p. 112; Arbuthnot v. Campbell, 1793, Hume 785; in D. Gordon v. Carmichael, 1800, Hume 805, the informal note was adopted in a holograph letter of the landlord's factor to the tenant, which referred to and was sent with it; Arbuthnot v. Reid, 1804, Hume 815 (factor's holograph); Skene v. Spankie, 1790, in 1 Bell, Leases, 313. The case of Drummond v. Gow, 1787, referred to in the same place, seems ill-decided.

⁵³ Gray v. Low, 1859, 21 D. 293.

⁵⁴ Ballantine v. Stevenson, 1881, 8 R. 959—lease signed by tenant and retained by landlord unsigned by him for a year,

while tenant possessed. There was payment of increased rent (the tenant having been subtenant previously), but this element was not required for the decision. In Forbes v. Wilson, 1873, 11 M. 454, there was distinct *rei interventus* besides.

⁵⁵ Maitland v. Neilson, *infra*, ⁵⁷; Erskine v. Glendinning, 1871, 9 M. 656; Broomfield v. Young, 1757, M. 9446; and see Rutherford v. Bowden Feuars, 1748, M. 8443, and succeeding cases; Poole v. Bentley, 12 East 168; Philip v. Benjamin, 9 A. and E. 644; Ridgway v. Wharton, 6 H.L. Cas. 238.

⁵⁶ Erskine v. Glendinning, *supra*, ⁵⁵; Wilson v. Douglas, 1868, 7 M. 112.

veyancing, there is no distinction between leases and other heritable rights.⁵⁷

Stamping.

Special statutory provisions are enacted for the regulation of the stamping of leases, and it will conduce to accuracy if these provisions are given in the actual terms of the subsisting Act.⁵⁸

General rules. The principal provisions of a general character in the Stamp Act, 1870, which require to be noticed here are as follows:—

Instruments to be separately charged with duty in certain cases. Terms upon which instruments may be stamped after execution.

8. An instrument containing or relating to several distinct matters is to be separately and distinctly charged as if it were a separate instrument, with duty in respect of each of such matters.⁵⁹

15. (1) Any unstamped or insufficiently stamped lease may be stamped⁶⁰ after the execution thereof on payment of the unpaid duty and a penalty of ten pounds, and also, by way of further penalty, where the unpaid duty exceeds ten pounds, of interest on such duty, at the rate of 5 per centum per annum from the day upon which the instrument was first executed up to the time when such interest is equal in amount to the unpaid duty.

Proviso—as to instruments executed abroad.

(2) Provided as follows:—(a) Any unstamped or insufficiently stamped instrument, which has been first executed at any place out of the United Kingdom, may be stamped at any time within two months after it has been first received in the United Kingdom on payment of the unpaid duty only; (b) the Commissioners may, if they think fit, at any time within twelve months after the first execution of any instrument, remit the penalty or penalties or any part thereof.

As to the remission of penalties.

17. Save and except as aforesaid, no instrument executed in any part

Instrument not duly stamped inadmissible.

⁵⁷ Cases of informal writs not cured by *rei interventus*: *Sproul v. Wilson*, *supra*, ³⁶ (not tested); *Maitland v. Neilson*, 1779, M. 8459, 17054 (neither missive probative); *Macfarlane v. Grieve*, 1790, M. 8459 (writer unnamed); *Kelly v. Innes*, 1619, M. 16876 (unauthenticated postscript); *Hume v. Dickson*, 1730, M. 16898 (defective witnessing). For cases in which defective writs were set up by *rei interventus*, see *infra*, p. 112.

⁵⁸ 33 & 34 Vict. c. 97. The statutes affecting leases immediately before 1870 were 13 & 14 Vict. c. 97; 17 & 18 Vict.

83; 23 Vict. c. 15; 28 & 29 Vict. c. 96, sect. 5.

⁵⁹ If a new lease be added on the same stamped paper as a former lease, the latter only will be struck at by the Act; see *Ross v. Steven*, 1749, M. 16935. The subtle distinctions which pervade

this part of the law of stamps cannot be set forth in a note; see *Tilsley*, pp. 272 *et seq.* The cases are English. It may be said, however, that, if the transaction be really one transaction, and if there is no fraud, a single stamp for the cumulative consideration will suffice though there be different subjects let at different rents, and for different periods; *Boase v. Jackson*, 3 B. and B. 185, and cases in *Tilsley*, 362.

⁶⁰ It is the custom to allow fourteen days without penalty. The after-stamping has retroactive effect, making the document operative *ab initio*; *Davidson v. Douglas*, and *Wood v. Kerr*, 1838, 1 D. 10, 14; *Mories v. Glen*, 1843, 6 D. 97. The following section (16) provides for the reception of after-stampable documents in Court, on payment of the penalty and £1 extra; see also 31 & 32 Vict. c. 100, sects. 41, 42.

of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done in any part of the United Kingdom, shall, except in commercial proceedings, be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity unless it is duly stamped in accordance with the law in force at the time when it was first executed.⁶¹

The following are the stamp duties to which leases are now The duties. subject in terms of the schedule of the Act of 1870 :—

LEASE OR TACK.⁶²

(1) For any definite term less than a year:⁶³ £ s. d.

(a) Of any dwelling-house or tenement, or part of a dwelling-house or tenement, at a rent not exceeding the rate of £10 per annum, . 0 0 1

(b) Of any furnished dwelling-house or apartments where the rent for such term exceeds £25, . 0 2 6

(c) Of any lands, tenements, or heritable subjects except or otherwise than as aforesaid, . { The same duty as a lease for a year at the rent reserved for the definite term.

(2) For any other definite term or for any indefinite term :

Of any lands, tenements, or heritable subjects—

Where the consideration, or any part of the consideration, moving either to the lessor or to any other person,⁶⁴ consists of any money, stock, or security :

In respect of such consideration,

{ The same duty as a conveyance on a sale for the same consideration.⁶⁵

Where the consideration or any part of the consideration is any rent :

⁶¹ Illustrated as to leases by *M'Niven v. Leith*, 1836, 14 S. 685; *Ross v. Webster*, 1834, 12 S. 308 (removing); *Grant v. Walker*, 1837, 16 S. 246 (interdict); *Summers v. Fairservice*, 1841, 4 D. 347; *Hutchison v. Ferrier*, *infra*, ⁶⁶ (annual inquiries whether tenant meant to sit on); *Kincaid v. Love*, 1835, 14 S. 188 (assignation). An unstamped document may, however, be given in evidence to prove a fact collateral to it, but in no case to establish or give effect to it. *Cases in Tilsley, Stamp Laws*, 3rd ed. 247 *et seq.*

⁶² The only statutory exemptions are under the Church Building Act, 5 Geo.

IV. c. 90, sect. 10; *Woods and Forests Act*, 10 Geo. IV. c. 50, sect. 77; and *Militia Act*, 17 & 18 Vict. c. 106, sect. 41. An obligation to remove requires no stamp, *Maclaren v. Ms. Breadalbane*, 1831, 10 S. 163; *Bain v. Stewart*, 1854, 14 D. 1007.

⁶³ Meaning, in Scotland, in case (a), 'not exceeding a year,' *infra*, p. 95.

⁶⁴ *E.g.*, Price of assignation of interest in a lease made between agreement for a lease and execution of the lease.

⁶⁵ *I.e.*, One-half per cent. on every completed or fractional sum of £5 up to £25; of £25 up to £300; and of £50 thereafter.

In respect of such consideration :

If the rent, whether reserved as a yearly rent
or otherwise, is at a rate or average rate :

	If the term is definite, and does not exceed 35 years, or is indefinite.	If the term being definite exceeds 35 years, but does not exceed 100 years.	If the term being definite exceeds 100 years.
	£ s. d.	£ s. d.	£ s. d.
Not exceeding £5 per annum,	0 0 6	0 3 0	0 6 0
Exceeding—			
£5 and not exceeding £10,			0 12 0
10 „ „ 15,	0 1 0	0 6 0	0 18 0
15 „ „ 20,	0 2 0	0 12 0	1 4 0
20 „ „ 25,	0 2 6	0 15 0	1 10 0
25 „ „ 50,	0 5 0	1 10 0	3 0 0
50 „ „ 75,	0 7 6	2 5 0	4 10 0
75 „ „ 100,	0 10 0	3 0 0	6 0 0
100			
For every full sum of £50, and also for any fractional part of £50 thereof, ...	0 5 0	1 10 0	3 0 0

(3) Of any other kind whatsoever not hereinbefore
described, ... 0 10 0

And see sections 96, 97, 98, 99, 100.

These sections are as follows :—

Agreements for
leases for not
more than
thirty-five
years to be
charged as
leases.

Sect. 96. (1) An agreement for a lease or tack, or with respect to the letting of any lands, tenements, or heritable subjects for any term not exceeding thirty-five years, is to be charged with the same duty as if it were an actual lease or tack made for the term and consideration mentioned in the agreement.

(2) A lease or tack made subsequently to, and in conformity with, such an agreement duly stamped, is to be charged with the duty of 6d. only.⁶⁶

Leases in re-
spect of pro-
duce or other
goods, *ad*
valorem duty
on value stip-
ulated or value
according to
rate of conver-
sion.

Sect. 97. (1) Where the consideration, or any part of the consideration, for which any lease or tack is granted, or agreed to be granted, does not consist of money, but consists of any produce or other goods, the value of such produce or goods is to be deemed a consideration in respect of which the lease or tack or agreement is chargeable with *ad valorem* duty, and where it is stipulated that the value of such produce or goods is to amount to, or is not to exceed, a given sum, or where the lessee is

⁶⁶ See the former law and practice in *Matheson v. Duff*, 1779, M. 16942; *Macdonald v. Macdonald*, 1778, M. 16956, *Hailes* 789; overruled in *Rollo v.*

Reid, 1787, M. 16944; *Hutchison v. Ferrier*, 1851, 13 D. 837, aff. 1 Macq. 196, 15 D. (H.L.) 7.

specially charged with, or has the option of paying after, any permanent rate of conversion, the value of such produce or goods is, for the purpose of assessing the *ad valorem* duty, to be estimated at such given sum, or according to such permanent rate.

(2) A lease or tack or agreement made either entirely or partially for any such consideration, if it contains a statement of the value of such consideration, and is stamped in accordance with such statement, is, so far as regards the subject matter of such statement, to be deemed duly stamped, unless or until it is otherwise shown that such statement is incorrect, and that it is in fact not duly stamped.

Statement of value conclusive until shown to be incorrect.

Sect. 98. (1) A lease or tack, or agreement for a lease or tack, or with respect to any letting, is not to be charged with any duty in respect of any penal rent, or increased rent in the nature of a penal rent, thereby reserved or agreed to be reserved or made payable, or by reason of being made in consideration of the surrender or abandonment of any existing lease, tack, or agreement of or relating to the same subject matter.

No duty in respect of penal rent or in consideration of surrender of existing lease.

(2) No lease made for any consideration or considerations in respect whereof it is chargeable with *ad valorem* duty, and in further consideration either of a covenant by the lessee to make, or of his having previously made, any substantial improvement of or addition to the property demised to him, or of any covenant relating to the matter of the lease, is to be charged with any duty in respect of such further consideration.

Lease liable to *ad valorem* duty not liable for substantial improvements by lessee as a further consideration.

(3) No lease for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, and no lease for a term absolute not exceeding twenty-one years, granted by an ecclesiastical corporation aggregate or sole, is to be charged with any higher duty than 35s.

Lease by ecclesiastical corporation.

(5) No lease or tack, or agreement for a lease or tack, in Scotland, of any dwelling-house or tenement, or part of a dwelling-house or tenement, for any definite term not exceeding a year, at a rent not exceeding the rate of £10 per annum, is to be charged with any higher duty than 1d.

Lease in Scotland of dwelling-house, &c., not exceeding a year, rent not exceeding rate of £10, duty 1d.

Sect. 99. The duty upon an instrument chargeable with duty as a lease or tack for any definite term less than a year of—

Lease less than one year of dwelling-house, &c., rent at rate not exceeding £10, same if furnished house, and also duplicate, may be denoted by adhesivestamp.

(1) Any dwelling-house or tenement, or part of a dwelling-house or tenement, at a rent not exceeding the rate of £10 per annum ;

(2) Any furnished dwelling-house or apartments ;

Or upon the duplicate or counterpart of any such instrument, may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is first executed.

Sect. 100. (1) Every person who executes, or prepares or is employed in preparing, any instrument upon which the duty may, under the provisions of the last preceding section, be denoted by an adhesive stamp, and which is not, at or before the execution thereof, duly stamped, shall forfeit the sum of £5.

If above leases not duly stamped at or before execution, penalty on person who executes or prepares, £5.

Proviso as to letters or correspondence.

(2) Provided that nothing in this section contained shall render any person liable to the said penalty of £5 in respect of any letters or correspondence.

Expense of after-stamping.

Where an unstamped deed is founded on by one of the parties in a suit, the expense of stamping will in the first instance be borne by that party;⁶⁷ but in the ultimate decision of the cause, if the deed is a mutual deed (such as a lease), which both parties were bound to stamp, the expense will, as a general rule, be divided equally between them.⁶⁸

Articles of Lease.

Articles of lease.

It is the practice in many large estates, for the purpose of securing regularity and, as far as possible, uniformity, in the system of agricultural management, and for the sake of brevity, to embody in a document called 'Articles of Lease,' the conditions and stipulations under which, unless validly modified, the different farms are to be let. These articles are different in different districts and even in adjoining estates, and they are altered from time to time according as ideas regarding the most suitable modes of cultivating the land change.⁶⁹ The principal point is to make sure that the articles have been adopted and incorporated in each lease of which they are intended to be a part. This adoption may be total⁷⁰ or partial,⁷¹ and no particular form of words is imperative.⁷² Thus adoption of articles of lease, unsigned by the tenant, was held to be proved sufficiently by a formal missive, binding the offerer—the tenant—in the conditions of another tenant's lease which incorporated the articles as being in course of preparation, and by a draft lease, signed by the tenant, and containing a reference to the articles as drawn up. Possession followed during the whole course of the lease.⁷³ Probably the Court of Session was right in thinking that the reference in the missive to inchoate regulations was too vague to be relied on. A copy written, or more usually printed, is delivered to each tenant,⁷⁴ and this is all the more expedient if, as is sometimes the case, the tenant does not sign a docquet on a copy of the articles for identification, or

⁶⁷ *Neil v. Leslie*, 1867, 5 M. 634; *Grant v. Walker*, 1837, 16 S. 246.

⁶⁸ *M'Douall v. Caird*, 1870, 8 M. 1012, overruling *Boyd v. M'Kenna*, 1824, 2 S. 712 (N.E. 593); *Monro v. Hogg*, 1830, 9 S. 225; and see *Church v. Sharpe*, 1843, 5 D. 876.

⁶⁹ Some forms have been collected in Appx. xiii. hereto.

⁷⁰ *Lyon v. Irvine*, 1874, 1 R. 512.

⁷¹ In *Pratt v. Abercromby*, 1858, 21 D. 19, only one of the estate regulations (as to drainage) was incorporated.

⁷² See 1 Jur. Styles (5th ed.), 581.

⁷³ *Gordon v. Anderson*, 1825, 4 S. 13, aff. 3 W. and S. 1; see *Gordon v. Robertson*, 1825, 3 S. 656 (N.E. 458), rev. 2 W. and S. 115.

⁷⁴ See *Crichton v. Meason*, 1828, 6 S. 403.

a copy is not annexed to his lease. The articles do not now require to be stamped,⁷⁵ being only of force as parcel of the incorporating lease. The articles are binding on the lessor and his successors, whether universal or singular, if properly adopted, and if the contract be otherwise complete⁷⁶ and they, like any other express bargain, override local custom.⁷⁷ These 'articles' are not to be confounded with mere jottings of the particulars of a lease which it is intended to put into formal shape in the future though this intention has never been carried out;⁷⁸ nor with conditions 'such as are to be granted to tenants now taking new leases.' The effect of the latter stipulation is to show that the whole conditions of lease are not contained in the document relied on, and to let in proof of what these conditions actually were, and particularly of any stipulation made about the same time as the said document, though in the interval there have been certain acts of possession.⁷⁹

Admissibility of Parole.

As in the case of other written contracts, parole evidence will be admitted to clear up a latent ambiguity; to show that a term in the lease has a technical meaning, and that it was used in that sense; or to explain, if relevant, the state of the premises at the date of the lease. The cases in which and the conditions under which custom or usage may be proved will appear in considering the obligations of parties. But, like other written contracts, leases cannot be controlled, redargued, or modified by understandings arrived at, or communings which took place between the parties prior to, the conclusion of the bargain or *unico contextu* with it and not reduced into obligatory form. The rule is in full operation where there is a formal lease—one document regulating the rights of the lessor and lessee.⁸⁰ Thus, where a lease was executed, proof of a verbal promise said to have been made by the lessors at the time of its execution, and said to have led to the tenant's engagement to give the stipulated rent, was refused as incompetent.⁸¹ And, where a lease recited that

Not controlled
by parole
evidence.

⁷⁵ Not mentioned in the subsisting Stamp Act, 33 & 34 Vict. c. 97. The Act 55 Geo. III. c. 184, which imposed a duty, was repealed *quoad hoc* by 33 & 34 Vict. c. 99.

⁷⁶ *Macra v. Mackenzie*, 1828, 6 S. 935 (signed *unico contextu*).

⁷⁷ *Gordon v. Thomson*, 1831, 9 S. 735.

⁷⁸ *E. Aboyne v. Ogg*, 1810, Hume 847; *Gammell v. Andersons*, 1836, 15 S. 233.

⁷⁹ *E. Mansfield v. Henderson*, 1856, 18 D. 989.

⁸⁰ On the principle of *Inglis v. Buttery & Co.*, 1878, 5 R. (H.L.) 87; and *Lee v. Alexander*, 1883, 10 R. (H.L.) 91; and earlier cases therein cited; *Stewart v. Clark*, 1871, 9 M. 616; *Barclay v. Neilson*, 1878, 5 R. 909; *Carmichael v. Penny*, 1874, 11 Sc.L.R. 636.

⁸¹ *Glasgow Mags. v. Macfaiet*, 1755, M. 12341; *Maxwell v. Burgess*, 1773, M. 12351, in effect overruling *Harrower v. Wells*, 1749, Elch. Prescription, 31.

certain subjects had been delivered over to the tenant at a given valuation, to be deducted from the value of the same at the outgoing, the landlord was not entitled to redargue the terms of his own 'solemn contract' by proving that only part of the subjects had actually been included in the valuation at entry.⁸² A lessor will not be entitled to withdraw a part of a subject let in a formal tack on the plea that it was inserted by mistake, and was not embraced in the preliminary minute;⁸³ nor a lessee to add to the subjects let something not mentioned in the lease, except on proof by writ or oath.⁸⁴ Where, on the other hand, the contract has to be spelt out of two or more documents *hinc inde*, the difficulty may arise whether these writs contain, or were intended to contain, the whole bargain; and the rule seems to be that the Court, if convinced that a valid contract has been established; that, as shown by *rei interventus* or by express terms, it is a lease for years; and that on the face of it there is something lacking to determine the true position of the parties, will allow proof *prout de jure* to supply the want. Therefore the endurance of a lease, proved by *rei interventus* to have been a lease for years, was thus supplied in a case which seems to transgress no maxim of our law.⁸⁵ If the missive does not suggest the necessity of supplement, nothing will avail except writ of date subsequent to the lease (or oath) with *rei interventus*.⁸⁶ Where the question relates not to the contents of the lease, but to the scope of the grantor's authority, parole evidence is of course admissible.⁸⁷

Proof of subsequent alterations.

But after the contract has been concluded there is nothing to prevent the parties or their successors from making any innovation on it they please, or from authorising a breach; and this may be proved by probative writ; by the oath of the party whose interest it is to maintain the contrary; or by informal writ⁸⁸ or parole, provided that in these last cases there be such *rei interventus* following on the alteration as instructs the assent or acquiescence of the said party. This rule was first given effect to without any elaborate argument in a case where the alteration from a grain to a fixed money rent was made out by proof

⁸² *Lawson v. Murray*, 1825, 3 S. 536 (N.E. 371).

⁸³ *E. Fife's Trs. v. Duncan*, 1824, 3 S. 241 (N.E. 178).

⁸⁴ *Stewart v. Clark*, *supra*, ⁸⁰.

⁸⁵ *Macleod v. Urquhart*, 1808, Hume 840; cf. *Morrison v. M'Kirdy*, 1841, 4 D. 254, 14 Sc. Jur. 100; *E. Mansfield v. Henderson*, *supra*, ⁷⁹.

⁸⁶ *Philip v. Cumming's Exrs.*, 1869, 7 M.

859; *Stewart v. Clark*, 1871, 9 M. 616. Cf. *L. Polwarth v. Murray*, 1887, Sc.W.N. 58.

⁸⁷ *Dods v. Walker*, 1822, 2 S. 81 (N.E. 73).

⁸⁸ See *Johnstone v. Grant*, 1844, 6 D. 875. Doubts have been expressed with what appears to be unnecessary scrupulosity as to whether a signed draft of an alteration could found *rei interventus*—*Sinclair v. M'Beath*, 1868, 7 M. 273.

of agreement followed by payment and accounting conform.⁸⁹ But the law in regard to innovation by verbal agreement can scarcely be said to have been settled before a celebrated judgment of the House of Lords,⁹⁰ which may be thus stated—reserving a consideration of the general law of *rei interventus* to a later page:—

A proprietor, by a written contract of lease, let the coal under his lands. The lessees were restricted from working within fifteen feet of the boundaries. On the allegation that this stipulation had been violated by the lessees, the lessor brought an action to have them compelled to erect a wall or barrier of the thickness stipulated. The lessees were also tenants of the coal in the lands adjoining. They alleged that the lessor had, on their request, verbally consented to allow them to work through the adjacent coal. And they set forth on the record various matters, which, as they maintained, involved *rei interventus*, and proved consent and acquiescence. The lessor admitted knowledge of what had occurred, but denied the existence of evidence of consent and acquiescence. In the Court of Session it was held incompetent to prove such a relaxation of, or departure from, an important part of a written lease by parole evidence. To offer to prove that such a request was made, and that the subsequent operations tended to show it was reasoning in a circle. The first thing to be established was, that there was such an agreement as that averred. Therefore any operation which took place after that date could never be of the smallest value in proving the existence of that agreement. But this judgment was reversed, and it was held that if, after a parole agreement has been made, there is what the law calls *rei interventus*, that is, if there are acts and circumstances following upon the agreement in performance of it, then it is no longer revocable. It is as valid as if it had been made in writing; and the averments of a verbal agreement and of the *rei interventus* following on it must be viewed in combination and as forming a whole, and sent to proof together. Neither element could stand alone.⁹¹

The soundness of the doctrine thus laid down has never been seriously impugned, and has recently been confirmed in a case

Wark v. Bargaddie Coal Co.

Kirkpatrick v. Allanshaw Coal Co.

⁸⁹ Baillie v. Fraser, 1853, 15 D. 747 (receipts for eleven years inconsistent with original bargain).

⁹⁰ Wark v. Bargaddie Coal Co., 1856, 18 D. 772, rev. 3 Macq. 467, 21 D. (H.L.) 1. The question did not really arise in Granger v. Geils, 1857, 19 D. 1010.

⁹¹ Gibb v. Winning, 1829, 7 S. 677 (no averment of express consent); and Scot v. Cairns, 1830, 9 S. 246 (feu, no averment of acquiescence), were therefore held rightly decided. See also E. Aboyne v. Ogg, 1810, Hume 847.

in which the facts demanded greater precision in the statement of the law than was necessary in *Wark's* case. To an action for a half-year's rent of a coal-field, the defence was that the landlord, in order to enable the tenant to resist the demand of his workmen for an increase of wages, had verbally agreed to reduce the rent by a third, and that on the faith thereof the tenant had resisted these demands and locked out the workmen for two months. A majority of the Judges of the First Division held that the *rei interventus* was insufficient; that the facts alleged were quite consistent with the lease as it originally stood; that there must be an inconsistency between the original contract on the one hand, and both the agreement and the acts inferring acquiescence on the other, and that, though there was some looseness in the language employed by the Lord Chancellor in *Wark's* case, the real import of the judgment was set forth by Lord Cranworth, where he spoke of its only dealing with 'something done in 'contravention of the lease.' Lord Shand was of opinion that it was enough if the agreement was inconsistent with the original bargain, and if the facts alleged were such as naturally followed on the innovation.⁹² It will be seen farther on, in treating of *rei interventus* generally,⁹³ that the ruling view is most in keeping with the maxim that the facts proved must be 'unequivocally referable' to the informal agreement.

By way of
abatement
(reduction) of
rent.

When the alteration in question is an abatement of rent, there is the additional difficulty, if the evidence of the agreement be merely parole, that the facts and circumstances relied on are usually susceptible of explanation, either as importing an ease, allowed year by year, or a permanent reduction. Thus, while a permanent reduction all over an estate has been made out by putting in evidence a letter from the landlord to his factor acted on for a course of years,⁹⁴ and while reference to oath has been suggested as the only competent mode of proving the new bargain apart from writ⁹⁵ or judicial admission,⁹⁶ proof by parole pure and simple has been rejected over and over again.⁹⁷ In one case the Court saw its way to a different conclusion, but the question was admitted to be difficult, and the point arose not out of a transaction of the ordinary sort, but out of one in which a

⁹² *Kirkpatrick v. Allanshaw Coal Co.*, 1880, 8 R. 327, and *dicta* in *Sutherland*, 1860, 22 D. 665, therein cited; and see a case of alleged communing with a factor, *Skinner v. L. Saltoun*, 1886, 13 R. 823.

⁹³ *Infra*, p. 114.

⁹⁴ *Lindsay v. Webster*, 1841, 4 D. 231.

⁹⁵ *Gibb v. Winning*, *supra*, ⁹¹.

⁹⁶ *Thomas v. Dumbreck*, 1834, 12 S. 285.

⁹⁷ *Riddick v. Wightman*, 1790, and *Grant v. Watt*, 1802, *Hume* 776, 777; *Law v. Gibsone*, 1845, 13 S. 396.

grain-rent was altered into a money-rent, with the ultimate result of loss to the tenant.⁹⁸

Cardinal Parts of a Lease.

The ordinary clauses in leases of the subjects which are in use to be let in Scotland will be referred to later in considering the rights and obligations of parties during the course and at the termination of the relation of landlord and tenant, and it would serve no good end to go through these clauses in order, for the purpose of suggesting suitable forms.⁹⁹ It is only necessary to notice here the mode in which the law regards the contract of lease when a question arises between the parties or their representatives—not by singular title—in respect to the cardinal parts of the contract—the parties, the subject, the rent, and the duration. The law relating to the parties to a lease has been sufficiently considered.¹⁰⁰ As to the subject matter, the freedom of contract entitles the parties to bind themselves and their representatives in regard to any subject which is or may come under their control, unless, as in the case of mansion-houses and their appurtenances on an entailed estate,¹⁰¹ there be a statutory disability; and it is only when an attempt is made to raise the lease of certain subjects into the position of real rights¹⁰² that the law refuses its aid. As to rent, the parties are entitled to agree to an elusory rent;¹⁰³ to a rent in the shape of service;¹⁰⁴ or to rent set against payment of interest on debt due by the landlord to the tenant, or reserved for liquidation of the same, or for any purpose not rendered illegal by the general law of contract. Or the rent may be wholly or partially discharged.¹⁰⁵ But probably there ought to be some reservation of rent, however elusory.¹⁰⁶ If there be no lease or agreement of lease at all, the occupant of a subject belonging to another is presumed to occupy as tenant at the annual value of the subject in lieu of rent.¹⁰⁷ But this liberty in adjusting the rent is subject to the disabilities which were pointed out in the first part of this work as affecting certain persons, such as limited owners and trustees.¹⁰⁸

Lastly, as to the duration of the right. A lease may, subject

Cardinal parts
of the con-
tract.

In questions
between
parties and
their personal
representa-
tives.

Parties.
Subject.

Rent.

Duration.

⁹⁸ Baillie v. Fraser, *supra*, ⁸⁹.

⁹⁹ See 1 Hunter, 367 *et seq.*; 1 Jur. Styles (5th ed.) 565.

¹⁰⁰ *Supra*, pp. 5 *et seq.*

¹⁰¹ *Supra*, p. 70.

¹⁰² *Infra*, p. 121.

¹⁰³ Sinclair v. M'Beath, 1788, Hume 773 (one penny Scots, if required).

¹⁰⁴ *Ibid.* (as factor); Lundie v. Smith of Lundie, 1610, M. 15166; Ersk. 2.6.54.

¹⁰⁵ Ross v. Blair, 1627, M. 15167, and cases under Act 1449, *infra*, p. 131; B. Pr. 1198.

¹⁰⁶ Durham, 1575, M. 15165; Ayton, 1625, M. 15167, 16476; Mellerstanes, 1591, M. 15165; 1 Bell, Leases, 35.

¹⁰⁷ Young v. Cockburn, 1674, M. 11624; Glen v. Roy, 1882, 10 R. 239.

¹⁰⁸ *Supra*, pp. 33, 54.

to what has already been set forth in regard to personal disability,¹⁰⁹ be granted in perpetuity,¹¹⁰ or for a very long period,¹¹¹ or for an indefinite period—as for and until the repayment of debt¹¹²—or for no specified period.¹¹³ When no period is specified the rule has been said to be to construe the term as being for one year only, or, if the lease implies a longer duration, then the shortest that the words admit of.¹¹⁴ And where a tack without an ish, but plainly importing a lease for years, had subsisted for years, immediate removing was ordered, apparently on the theory that the possession was—at the date of the action at least—reduced to possession from year to year.¹¹⁵ But the modern rule is the more equitable—to let in proof of the intention of parties in executing what, though defective, was evidently meant to be a contract of lease, by parole,¹¹⁶ with or without the aid of preliminary documents, such as advertisements.¹¹⁷ The absence of an ish may, however, have another result; it may go far to show that the transaction was never intended as an assurance, but only as a revocable lease or licence. The tenant of a coal-pit agreed to let adjoining owners have the water which was pumped from his pit and discharged theretofore into a stream, ‘so long as he continued to pump,’ on condition that he was to be put to no expense in the matter, and that his own use of the water was not to be interfered with. The grantees after three years’ use obtained a better supply elsewhere, and ceased to make use of the former supply and to pay the stipulated rent or price. Lord Mure’s construction of the bargain was, that the grantees would have had to continue paying the return, though they ceased to carry on the operations for which the water was required, and that an ish was to be found in the termination of the grantor’s own lease, and not till then. But the other Judges of the First Division took

¹⁰⁹ *Supra*, chaps. i., ii.

¹¹⁰ *Crichton v. Vt. Air*, 1631, M. 11182, S.C. 15191 (from five years to five years); *Carruthers v. Irvine*, 1717, M. 15195 (‘as long as the grass groweth up and the water runneth down’); *Ker v. Waugh*, 1752, M. 10307; and cases on Act 1449, *infra*, p. 124; 2 Ross’ Lect. 490; 1 B.C. 66.

¹¹¹ *Houston v. L. Garnock*, mentioned at M. 10308 (400 years); *Welwood v. Husband*, 1874, 1 R. 507 (999 years); *L. Adv. v. Fraser*, 1758, M. 15196, 1 Hailes 406, rev. 2 Pat. 66 (1140 years; Crown bound as coming on forfeiture in

place of one who represented the lessor, as explained in 1 Bell, Leases, 421; *Knox v. Irvine*, 1759, M. 5276, 15199.

¹¹² *Armour v. Lands*, 1671, M. 16284; *M’Tavish v. M’Lauchlan*, 1748, M. 1736; S.C., M. 15248.

¹¹³ *Redpath v. White*, 1737, M. 15196.

¹¹⁴ *Ibid.*; Cr. 2.10.7; *Mack*. 2.6.9; St. 2.9.16; B. Pr. 1194; 1 Bell, Leases, 315.

¹¹⁵ *Clark v. Lamont*, 27th Jan. 1816, F.C. 72.

¹¹⁶ *M’Leod v. Urquhart*, *supra*, 85.

¹¹⁷ *Russell v. Freen*, 1835, 13 S. 752; *Wilson v. Mann*, 1876, 3 R. 527.

what seems to have been the sounder view, that there was no lease on account of the absence of *ish*, more especially as the grantor might, without recourse, have put the arrangement to an end by ceasing to pump.¹¹⁸

III. PROOF OF LEASES NOT FORMALLY CONSTITUTED.

1. *Of Leases for not more than a year.*

All leases which are not constituted by probative writ or writs 'Verbal are, by a somewhat unfortunate nomenclature, known as 'verbal' Leases.' leases, meaning thereby, not that they are constituted by word of mouth, but that some evidence other than documentary is required to establish the existence of the contract. To one sort of these the term is quite properly applied, for, as has been hinted above,¹¹⁹ by an exception to the rule requiring formal writing, or, perhaps, by adhering to the common law of location as a purely consensual contract¹²⁰ requiring no formality of constitution, leases for not more than one year may be proved *prout de jure*, by witnesses as well as by the other modes of probation known to the law,¹²¹ whether there has been possession or not.¹²² Where besides parole there is also documentary evidence, it will be a question depending for its answer on the circumstances of each case, whether the document was intended to exclude further inquiry into the terms of the bargain, or can only be regarded as part of the evidence thereof. The facilities which now exist¹²³ for after-stamping, even in the course of a law-suit, deprive the question of much of its former importance,¹²⁴ and the point raises more a speculative than a practical difficulty, since in most cases the character of the writ—as a bungled tack intended to be regular,¹²⁵ a letter and reply offering and accepting relocation from year to year,¹²⁶ or a mere jotting of terms—will at once betray itself. The onus of proof may be shifted from the tenant to the landlord if, in reply to an averment of a usual, he alleges an unusual, period of endurance.¹²⁷

¹¹⁸ *Dunlop & Co. v. Steel Co. of Scotland*, 1879, 7 R. 283.

¹¹⁹ *Supra*, p. 89.

¹²⁰ I. (3.25); 1.2 D. (19.2); C. (4.65); Pothier, Louage; St. 1.15; Ersk. 3.3.14; B. Pr. 136; 1 B.C. 452.

¹²¹ Cr. 2.10.10; St. 2.9.4; Mack. 2.6.5; Bankt. 1.11.23 and 2.9.5; Ersk. 2.6.30; 3.2.2; B. Pr. 1187; 1 Bell, Leases, 281; and cases on p. 90, *supra*, notes ⁴⁵, ⁴⁶. *Cowan v. Brownlee*, 1833, 12 S. 65, is not *contra*.

¹²² *L. Pitsligo v. Paton*, 1678, M. 12410,

does not seem to be law. See *Jackson v. Grahame*, 1705, M. 12413. *Bruce*, 1628, M. 3609, is not in point.

¹²³ *Supra*, p. 92.

¹²⁴ *Hutchinson v. Ferrier*, 1851, 13 D. 837, aff. 1 Macq. 196.

¹²⁵ *Harrold v. Stewart*, 1844, 6 D. 1103; *Sutherland v. Hay*, 1845, 8 D. 283; *Anderson v. Tuach*, 1870, 7 Sc.L.R. 319 (promissory note for rent).

¹²⁶ *Hutchinson, supra*, ¹²⁴.

¹²⁷ *Gibson v. Adams*, 1875, 3 R. 144 (seven months).

Arles or
earnest.

The bargain seems to be neither the better nor the worse for the giving of arles or earnest. Thus, in a case where arles and caution for rent were given, and the owner of the house, hearing that the lessee in the interval between the bargain and the date of entry had gone to England with all her effects, gave a lease to another party, the Court found that he was not entitled to do so; but the judgment in favour of the first lessee was not in any way based on the arles.¹²⁸ But, contrary to the general rule,¹²⁹ local custom may establish a right in a lessee of house-property by formal instrument to overgive or throw up the bargain at a certain distance of time before the date of entry, the only penalty being forfeiture of the earnest.¹³⁰ If there had been no earnest there would have been no penalty, for, the overgiving having been timeous, the landlord in the actual case had by reletting saved himself from injury.¹³¹

Oath on refer-
ence.
Judicial
admission.
Proof in tacit
relocation.

Of course, the oath of party on reference,¹³² or his judicial admission, is equally competent in proof of these short leases.

Proof of
alterations.

The opinion has been hazarded that when tacit relocation supervenes at the termination of a lease deviations from the original bargain may be proved by parole, since the lease is only *primâ facie* evidence of the terms of the verbal lease which has been engrafted on it.¹³³ But this seems to be an inaccurate view of the effect of tacit relocation, and the deduction drawn from it seems to be open to grave doubt.¹³⁴ If the lease be merely verbal its terms may from time to time be altered by agreement, proveable by parole evidence; as, for instance, where the landlord intimated certain proposed innovations on the contract, with notice to the tenant that if he had objections they must be stated within a given time, and, in default of objection, the tenant was held to have consented to the change.¹³⁵

Duration.

If a verbal lease or paction be made for a period longer than one year it has been said that 'it would not be binding even for one year, because the terms and conditions must have been adjusted at the commencement of a course of years, and would probably be quite unsuitable to a shorter period; and the allowing such an agreement to be binding for one year would be to convert one transaction into another.'¹³⁶ This doctrine is

¹²⁸ Topping v. Barr, 1830, 8 S. 973.

¹²⁹ B. Pr. 173.

¹³⁰ Watt v. Stewart, 1703, M. 8472 (forty days before term).

¹³¹ Ker v. Downie, 1670, M. 8470 (fourteen days too late).

¹³² Stewart v. Leith, 1766, M. 15178.

¹³³ Tait, Ev. 222; Dickson, Evid. sects. 113, 173.

¹³⁴ *Infra*, chap. xxii.

¹³⁵ Morrison v. Campbell, 1842, 4 D. 1426.

¹³⁶ Tait on Evid. 221; Tait's Justice of Peace, 384.

apparently sound, where possession has not followed, and matters are entire.¹³⁷ Thus, a tenant in a verbal lease for years, on which he had never possessed, was held entitled to resile, but he was bound to pay a penalty, which, by his own admission, was stipulated for in the event of his resiling.¹³⁸ Where, however, the lessee has entered into possession under a verbal lease for a series of years, the lease will be obligatory upon both parties for one year, and the lessee must pay the stipulated rent.¹³⁹ But even although there has been possession and rent has been paid, a verbal lease for a term of years is binding for one year only, and either party is entitled to resile at the end of each successive year.¹⁴⁰ It cannot be said, however, that this rule of subsistence for a year, and from year to year, is settled law; for there was much difference of opinion on the Bench in a modern case in which the point did not require to be settled. A lease of furnished rooms for sixteen months, it was held, could not be proved by parole; but the frame of the issues did not raise the question now under discussion. Something will, doubtless, turn on the hardship caused *hinc inde* to the parties by removing at a broken term.¹⁴¹ And there may be a right to indemnification for outlay expended *in bonâ fide* and on the faith of a valid contract.¹⁴² Meliorations by either party or other *rei interventus* will not avail to set up as a lease for years a contract proved only by parole evidence.¹⁴³ The question in such cases will be whether there are stipulations in the lease for years incompatible with a one year's lease.¹⁴⁴

The rule requiring probative writ in dealing with heritages is not founded on the old Statute 1449, c. 17, which converts leases of certain subjects—and not of others—into real rights on certain conditions. So that it may be allowable to conjecture—

In leases of incorporeal subjects.

¹³⁷ 1 Bell, Leases, note y, pp. 281-3.

¹³⁸ Skeen, *infra*, ¹⁴⁰.

¹³⁹ Tait on Evid. 229; Bell, Leases, *supra*, ¹³⁷.

¹⁴⁰ St. 2.9.4; Bankt. 2.9.5; Ersk. 2.6.30 and 3.2.2; 1 B.C. 388; 1 Bell, Leases, 281-5; Edmonston v. Edmonston, 1566, M. 12418; Mowat v. Johnston, 1636, M. 8400, 15170; Skeen, 1637, M. 8401; Paterson v. Burton, 1711, 4 B.S. 830; Mackenzie v. Trotter, 1729, M. 8437; L. Braco v. Innes, 1742, M. 15176; Stewart v. Leith, 1766, M. 15178; Buchanan v. Baird, 1773, M. 8478; A v. B, 1791, M. 15181; Neill v. E. Cassillis,

22nd Nov. 1810, F.C. 40, overruling A v. B, 1629, M. 8400.

¹⁴¹ Fowle v. M'Lean, 1868, 6 M. 254. See the analogy of contract of service in Fraser, M. and S. 30, 36, and esp. Paterson v. Edington, 1830, 8 S. 931.

¹⁴² Walker v. Milne, 1823, 2 S. 379 (N.E. 338); Bell v. Bell, 1841, 3 D. 1201.

¹⁴³ Pp. 106 *seqq.*; and Skeen, *supra*, ¹⁴⁰; Mackenzie v. Trotter, *supra*, ¹⁴⁰; Neill v. E. Cassillis, *supra*, ¹⁴⁰.

¹⁴⁴ Sinclair v. Weddell, 1868, 5 S.L.R. 664; Irvine v. Field, 1871, 8 S.L.R. 381.

though there is no authority in point—that it would be as incompetent to let out rights to rents, game, services, ferries, or feu-duties, by word of mouth for a longer period than a twelve-month, as to let out land, mills, mines, fishings, or woods. A case in which right to the use of steam for heating purposes was claimed by the tenant of a factory with steam-power under a formal lease does nothing to illustrate the point, for the claim was really to be allowed parole proof of a covenant omitted from a written contract, and therefore plainly inadmissible.¹⁴⁵ But a not too distant analogy may be drawn from another sort of location—the *locatio operarum* or contract of service—where the same distinction is drawn between contracts for not more than a year and contracts of longer endurance.¹⁴⁶

2. Of Leases for more than a year.

An equitable
modification of
the strict rule.

It has been already pointed out that there is a salutary modification of the strict rule requiring probative writ or writs in constituting leases for more than a year, where the conduct of parties makes enforcement of that rule demonstrably inconsistent with good faith. The law cannot be better stated than in the words of L.P. Inglis :¹⁴⁷—‘ If things have been done on the faith of the agreement and in pursuance of it—that is to say, if the agreement has been followed by *rei interventus*, there is a rule of law to this effect, that an improbate writing combined with *rei interventus* shall be sufficient. The operation of *rei interventus* is sometimes expressed as a bar to *locus pœnitentiæ*, but the practical effect is that it perfects the contract. Further, a verbal lease for a period of years, followed by *rei interventus*, will be sufficient. . . . With regard to the verbal bargain I think it is quite fixed that that can only be proved in one or other of two ways. The first mode is by writing. There is nothing anomalous in saying that a verbal bargain may be proved by writing; for there may be writing enough to prove though not to constitute the agreement. The other mode is by oath.’¹⁴⁸ There are thus two elements requisite to the completion of a binding contract in this informal mode : (A) proof of

¹⁴⁵ Stewart v. Clerk, 1871, 9 M. 616.

¹⁴⁶ B. Pr. 173, 190; Caddell v. Sinclair, 1749, M. 12416; Paterson v. Edington, *supra*, ¹⁴¹; Fraser, M. and S. 28 *et seq.* No help is got from a case relating to a duty-house let with, but not possessed as accessory to, town customs; Greig v. Boyd, 1827, 6 S. 250; Scott v. Boyd, 1829, 7 S. 592.

¹⁴⁷ Then L.J.-C., in Walker v. Flint, 1863, 1 M. 417, 421, containing matter quoted, *supra*, p. 89.

¹⁴⁸ See also general obs. in Gowans' Trs. v. Carstairs, 1862, 24 D. 1382, 1386, 1387, 1389, to the same effect; Gibson v. Adams, 1875, 3 R. 144; Philip v. Cumming's Trs., 1869, 7 M. 859.

the agreement, which can only be by writ or by the oath of the person who is or might be made the defender in an issue in which the existence of a lease is put in question; and (B) proof of the conduct of the parties following on the agreement (*rei interventus*). In each case these two elements must be looked at together, as *unum quid*, the force and relevancy of each being only to be judged of with reference to the other; they must be correlative. But it is possible, and it may be useful, in illustration of the rule, to set out separately what sort of writs have or have not been admitted for the purpose of letting in proof of *rei interventus*; how an agreement may be proved by oath; and what sort of facts have or have not been held to come up to proof of acquiescence, so as to complete the contract.

A. EVIDENCE INSTRUCTING AN AGREEMENT.

1. *Writ*.

As to the capacity of certain writs to instruct agreement of writ parties, there is no doubt or difficulty. To this category belong a minute or missives signed by both parties, but neither holograph nor tested;¹⁴⁹ a missive signed by the landlord¹⁵⁰ or by the tenant,¹⁵¹ and labouring under the same informality. The informality may arise in various ways, as by being initialed instead of being signed in full,¹⁵² faulty execution by notaries,¹⁵³ the lack of subscription by witnesses,¹⁵⁴ or of a date.¹⁵⁵ It is equally clear that the writ of a factor empowered to grant leases is equivalent to the writ of his constituent, the scope of his authority being a matter of fact proveable *prout de jure*.¹⁵⁶ Thus while a proposed additional agreement between landlord and tenant, dictated by the landlord to his factor in the tenant's presence, and handed

Minute, missives.

Factor's writ.

¹⁴⁹ *Duncan v. Barron*, 1762, M. 15177, 16984, Elch. Tack, 19; *Campbell v. M'Pherson*, 1793, Hume 786.

¹⁵⁰ *Grant v. Richardson's Reps.*, 1788, M. 15180; *L. Arbuthnot v. Campbell*, 1793, Hume 785; *M'Pherson v. M'Pherson*, 15th May 1815, F.C. 352; *Cs. Moray v. Stewart*, 1772, M. 4392, 15179, rev. 2 Pat. 317 (offer signed by a number of tenants, but not tested); *Sievwright v. Scott*, 1796, Hume 790.

¹⁵¹ *Pollock v. Craig*, 1773, 5 B.S. 621; *Forbes v. Wilson*, 1873, 11 M. 454; *Ross v. Ross*, 1790, Hume 774; *Graham v. Gowans*, 1792, Hume 784; *Keir v. D. Athole*, 1815, 6 Pat. 130.

¹⁵² *Drummond v. Scott*, 1787, 1 Bell,

Leases, 306; *Gardner v. Beresford's Trs.*, 1878, 4 R. 885, 5 R. 638, aff. 5 R. (H.L.) 105, 3 App. Cas. 582.

¹⁵³ *M'Morran v. Black*, 1624, M. 16830, 17012.

¹⁵⁴ *Grant v. Grant*, 1753, M. 13841, did not raise the point, being decided on the plea of all parties not called, but there can be no doubt of the law.

¹⁵⁵ *Gordon v. Hall*, 1757, M. 15178 (not properly a case of want of formality).

¹⁵⁶ *Sinclair v. Caithness Flagstone Co.*, 1880, 7 R. 1117, 1120, *per* L.P. Inglis; aff. on this point, 8 R. (H.L.) 78, 90, *per* L. Watson; *Emslie v. Duff*, 1865, 3 M. 854.

to the tenant unsigned, and by him afterwards accepted in writing, was an incomplete contract open to repudiation by either party, it would have been an excellent foundation for *rei interventus*.¹⁵⁷ If the factor have no authority, express or implied from the course of estate management, his writ will of course not bind the landlord.¹⁵⁸ A letter addressed by a factor not to the tenant but to a subfactor, and by him delivered to the tenant as his title is equally available as if it had reached him direct.¹⁵⁹ A missive signed *per* procuration for the landlord in whose name it ran by his son at his request, though insufficient to bind the landlord by itself, was held to be protected from repudiation by the conduct of the parties.¹⁶⁰

Articles of
roup.

There are also certain writs, having as their proper function to lead up to a formal lease, as to which there is little difficulty in assuming that, if a formal contract is not executed, and the parties proceed as if it had been, the reason is mere neglect, or anything rather than that the contract was incomplete. Such are articles of roup, open to objection on the score of informality or otherwise, but followed by an offer from the intending tenant;¹⁶¹ and an advertisement similarly accepted.¹⁶² There are other documents of a more private nature, of which the same cannot be said, and which nevertheless have over and over again been admitted for the purpose of letting in proof of *rei interventus*.

Advertisements.

Drafts, copies.

Of this sort are drafts and copies of leases. It is necessary to examine carefully the circumstances in which they have been admitted. In the earliest case an unsigned draft lease was given by the landlord to an outgoing tenant, and the intention of parties to make 'a finished transaction,' was shown by receipts for rent which expressly mentioned the 'new' or 'second' tack.¹⁶³ In the next case, Lord Glenlee founded his judgment, allowing proof of *rei interventus*, on an unsigned draft prepared by the landlord's agent, and not effectively repudiated by the landlord himself, while the other Judges (erroneously) were satisfied with

¹⁵⁷ Sinclair, ¹⁵⁸ (there was no proper averment of *rei interventus*). See also Ross v. Ross, *supra*, ¹⁵¹.

¹⁵⁸ Campbell v. Robertson, 1797, noted in Maxwell v. Grierson, Hume 849.

¹⁵⁹ Arbuthnot v. Reid, 1804, Hume 815.

¹⁶⁰ Bell v. Goodall, 1883, 10 R. 905; and in Scottish Lands, &c., Co. v. Shaw,

1880, 7 R. 756 (sale).

¹⁶¹ Haly v. Sands, 1749, M. 16354; Elch. Tack, 15 (the offer was written, but this would not be necessary).

¹⁶² Campbell v. McKinnon, 1867, 5 M. 636, aff. 8 M. (H.L.) 40. In Russel v. Freen, 1835, 13 S. 752, the advertisement supplied the duration.

¹⁶³ Grieve v. Pringle, 1797, M. 5951.

parole.¹⁶⁴ In the latest case¹⁶⁵ there was an unsigned draft, from which could be ascertained all the essentials of a lease. It was drawn by or for the landlord, revised by the tenant, and returned as adjusted to the landlord, and there was written corroboration of the transaction in entries in a rental book and in certain accounts. Though it thus appears that in the two most authoritative cases the drafts did not stand alone in proof of the agreement, it does not seem to have been held that written corroboration is required;¹⁶⁶ and it may be assumed that the *rei interventus* which supervenes is the best proof of the intention not to regard a draft as a merely preparatory document. And this will more particularly be the case where the draft is the only document embodying the terms of the contract. If, on the contrary, an original bargain is contained in a completed lease or minute, a mere draft, intended only as such, though signed by one of the parties, will not let in *rei interventus* to prove any innovation on that bargain.¹⁶⁷ Notarial copies of missives would be equally available.¹⁶⁸ An unsigned minute may be set up as containing the terms of a contract by a signed writ competently referring to it as such from one of the parties or his factor.¹⁶⁹ The same rules would be applied to an extended lease never signed.¹⁷⁰

The evidence of agreement is still more slender where the writ consists of notanda or memoranda by the landlord in his estate-books or elsewhere. Yet it is well established that such notes may be used as foundation for *rei interventus*.¹⁷¹ An unsigned note holograph of the landlord, containing the names of tenants, the farms for which their offers were accepted, and the rent, and retained in the landlord's possession, has been held sufficient for this purpose, but the judgment turned chiefly on the fact that the memorandum was a semi-public document

Memoranda in estate books.

¹⁶⁴ Campbell v. Dougal, 1813, Hume 861.

¹⁶⁵ Bathie v. L. Wharnccliffe, 1873, 11 M. 490.

¹⁶⁶ See opinions of 1st Division in Bathie, ¹⁶⁵.

¹⁶⁷ *Semble*—Sinclair v. M'Beath, 1869, 7 M. 273, but the point did not require to be decided, since the averments of *rei interventus* were insufficient.

¹⁶⁸ In Williamson v. Fraser, 1834, 12 S. 466, it was admitted that there had been a lease, and the question was as to its terms, and these were ascertained from

copies sent by the landlord's factor to the tenant, the originals being lost.

¹⁶⁹ D. Gordon v. Carmichael, 1800, Hume 805 (the factor's writ was probably holograph, and the contract was therefore completed by the tenant's mere possession, *supra*, p. 91).

¹⁷⁰ See *per* L. Moncreiff, L.O., in Girdwood v. Wilson, 1834, 12 S. 576.

¹⁷¹ It has been even questioned on the Bench whether they do not constitute written leases; E. Dalhousie v. Crokat, 1868, 6 M. 659.

applicable to a large number of tacks.¹⁷² Similarly, entries for a long series of years in the rental book of a society instituted for the purpose *inter alia* of acquiring and giving out land for settlement were, when taken along with the advertisement of lots, held to be habile titles to let in proof of *rei interventus*.¹⁷³ It is said to have been decided in more than one unreported case that a memorandum in a landlord's pocket-book mentioning the endurance of a lease, would suffice;¹⁷⁴ but the opinion may be hazarded that this could only have been decided in very exceptional circumstances, or in connection with other writs. In a case which was narrow in each part of it,¹⁷⁵ the writs which were held to instruct agreement were—a letter from the landlord to his son asking him to get the answers of certain villagers on the estate to an offer of leases made previously to them; the son's note-book containing memoranda of some answers; a list in which the factor marked the names of some villagers as willing to take leases and held equivalent to a rent-roll; and letters from the landlord to his son and factor, explaining why he did not desire a final settlement, and suggesting an *interim* arrangement which showed that he held these villagers bound by their agreement in any event.¹⁷⁶ A case, similarly complicated, and therefore of little use as a precedent, involved mainly an entry in a factor's books; receipt for rent and rates; and a guarantee of assistance in an action brought by the tenant as such.¹⁷⁷ On the other hand, where a landlord kept no rental-book but only a ledger, in which there was an entry charging a tenant with rent and adding figures which meant, as the landlord swore on a reference to his oath, that the verbal settlement he had made with his tenant began in 1802, and was to terminate in 1817, neither writ nor oath was held to instruct a contract, though it may now be assumed they would have supported a plea of *rei interventus* if that had been in the case.¹⁷⁸

Of large
estates.

In all these cases, while keeping in view that the function of the writ or oath is not to constitute the lease, but to instruct the existence of a verbal agreement, it will be well not to forget the distinction between a writing 'irregular and unshapely as it may be

¹⁷² *E. Aboyne v. Ogg*, 1810, Hume 847 (duration was admitted). See *Bathie v. L. Wharnccliffe*, *supra*, 163.

¹⁷³ *Campbell v. McKinnon*, 1867, 5 M. 636, aff. 8 M. (H.L.) 40.

¹⁷⁴ 1 Bell, Leases, 307-8.

¹⁷⁵ See *infra*, p. 116.

¹⁷⁶ *Sellar v. Aiton*, 1875, 2 R. 381.

¹⁷⁷ *Ogilvy v. Ramsay*, 1802, 1 Bell, Leases, 508 (the last element seems the most important).

¹⁷⁸ *Maxwell v. Grierson*, 1812, Hume 849.

' which appears to have been intended by the parties at the time ' as the permanent evidence of a finished agreement,' and ' a brief ' note or occasional memorandum made by the landlord for his ' own private use, or some transient and incidental mention of ' terms of set in a writing destined for some quite different ' purpose.'¹⁷⁹ Perhaps it may be laid down on a review of the circumstances of the cases in which such notanda have been admitted, that the admission will be confined to entries in documents which affect a considerable number of tenants, like the rent-roll of a large estate, or notes of negotiations with a number of tenants at the same period of time. This view receives some further support from a decision in which the Court admitted as the sole writ, a letter from the husband of a proprietrix (who left the management to him) giving a list of farms, with the rent, duration of lease, &c., to the surveyor of taxes, in order to enable him to make up the valuation roll, and by him acted on. The reason for thus admitting a *res inter alios acta*, was that the letter was not a mere private writing, but a statutory return regulating political rights, taxes, and rates.¹⁸⁰ The existence and import of a lease have been held to be instructed—(1) by a letter from the tenant (then sitting from year to year) asking leave to break up pasture, and to perform certain operations which would occupy a period of years; (2) an acceptance signed by but not holograph of the landlord; (3) a letter from the landlord's agents to the tenant, declaring the ish; (4) an advertisement of sale of the estate, showing the ish and rent; and (5) entries in the cash-book of the factor (who was also the tenant) docquetted by the landlord or his representatives and audited.¹⁸¹ In the Registration Court, entry in the factor's accounts and collection lists has been with good reason rejected.¹⁸²

On the other hand, a simple receipt for rent is not a sufficient writ.¹⁸³ The Court has twice refused this effect to receipts which bore that the rent paid was for part of a new tack or new agreement for a term of years.¹⁸⁴ In the one case, the receipt was written by the tenant, and might have been signed by the landlord without advertng to this unusual addendum. In the other case, the writing was wholly that of a factor who had no power to grant

Receipts for rent.

¹⁷⁹ *Per* Baron Hume in reporting last case.

¹⁸⁰ *Emslie v. Duff*, 1865, 3 M. 854.

¹⁸¹ *Wilson v. Mann*, 1876, 3 R. 527.

¹⁸² *Craig v. Bell*, 1871, 10 M. 8.

¹⁸³ *Gowans' Trs. v. Carstairs*, 1862, 24 D. 1382.

¹⁸⁴ *Anon.* 1798, and *Campbell v. Robertson*, 1797, noted in *Maxwell v. Grierson*, Hume 849.

leases. The broad question is thus open, whether a receipt for rent, drawn and signed by a landlord or his authorised agent, and setting forth the footing on which the rent was paid to be a lease for years, would be accepted as sufficient to let in proof of acquiescence. On a review of the cases which have occurred during the present century, it can hardly be doubted that it would.

2. *Oath of Party.*

It is now settled,¹⁸⁵ after some fluctuation of opinion,¹⁸⁶ that a verbal agreement may be proved by the oath on reference of the party who is or might be made defender in an issue putting in question the existence of an agreement; in other words, of the party who attempts to deny or to reseil.¹⁸⁷ The rule does not affect singular successors of the lessor, who are entitled to ignore everything but writing.¹⁸⁸ It has its equivalent in a judicial admission.¹⁸⁹ The Court will satisfy itself of the relevancy and sufficiency of the averments of *rei interventus* before allowing the oath to be taken, otherwise the solemnity might be futile.¹⁹⁰ The whole stipulations of the lease have to be proved by writ, or oath, or judicial admission, and it will not be permissible to instruct by parole evidence any stipulations which are not therein contained.¹⁹¹

B. *REI INTERVENTUS.*

In a passage which has been frequently adopted on the Bench as law, Mr. Bell says,¹⁹² '*Rei interventus* raises a personal exception, ' which excludes the plea of *locus pœnitentiæ*. It is inferred ' from any proceedings not unimportant on the part of the ' obligee, known to and permitted by the obligor to take place ' on the faith of the contract as if it were perfect ; provided they ' are unequivocally referable to the agreement and productive of ' alteration of circumstances, loss, or inconvenience, though not ' irretrievable.' Elsewhere Mr. Bell¹⁹³ describes, in contrast to this, the sort of facts which are required to prove not only the

¹⁸⁵ B. Pr. 1187; *Walker v. Flint*, 1863, 1 M. 417; *Gowans' Trs. v. Carstairs*, 1862, 24 D. 1382, 1387, 1388; *Neill v. E. Cassillis*, 22nd Nov. 1810, F.C. 40; *M'Rorie v. M'Whirter*, 18th Dec. 1810, F.C. 86.

¹⁸⁶ Cf. *Baillie v. Somerville*, 1611, M. 8398; *Low v. Lyell*, *ibid.*; *Johnston v. Logan*, 1621, M. 8399; *Lawrie v. Keir*, 1630, M. 12736, 15169; *Murray*, 1630, M. 15170, with *Braco v. Innes*, 1742, M.

15176; *Brodie's Stair*, p. 369; *Tait*, *Evid.* 222.

¹⁸⁷ *More's Notes*, 67. Not of a party long out of possession. *Thomson v. Young*, 1828, 7 S. 32.

¹⁸⁸ B. Pr. 1187, *infra*, p. 119.

¹⁸⁹ *Macrorie*, *supra*, 185.

¹⁹⁰ See *Braco v. Innes*, *supra*, 186.

¹⁹¹ *Paterson v. E. Fife*, 1865, 3 M. 423.

¹⁹² B. Pr. 26.

¹⁹³ B. Pr. 946.

rei interventus but also the implied contract or permission itself on which it follows—‘Where great cost is incurred by operations ‘carried on under the eye of one having a right to stop them, ‘or where under the eye and with the knowledge of him who ‘has the adverse right, something is allowed to be done which ‘manifestly cannot be undone, the law will presume an agreement or conventional permission as a fair ground of right.’¹⁹⁴ We have here to do only with *rei interventus* of the first degree, whose function is to prevent repudiation of an express contract, not to prove the contract itself. It will be observed that the emphasis of the facts is much weaker in the former than in the latter case. The question whether the facts are strong enough to bar resiling is, in every case, a question of circumstances.

The contract being mutual, and each party, therefore, at the same time obligor and obligee, the actual proceedings which, where acquiesced in, clinch the bargain, may be those of either or both.¹⁹⁵ But there is greater difficulty in relying on the landlord’s actings than on the tenant’s, for, in many cases, it may be argued that the proceedings would be equally available and beneficial whatever tenant might be obtained.¹⁹⁶ They must follow in time the verbal agreement, though not necessarily the writ or oath by which it is instructed;¹⁹⁷ and they must be ascribable to that agreement, not to some other (such as a formal lease) which has supervened.¹⁹⁸ The knowledge and permission required does not necessarily involve actual cognisance and conscious permission of everything or anything that is done on the faith of the agreement; for it is enough if the one party puts the other into a position in which he may fairly rely on the existence of an agreement, and the latter acts accordingly.¹⁹⁹ The circumstances in which knowledge by the landlord of the tenant’s actings would be regarded as requisite, are illustrated below.²⁰⁰

¹⁹⁴ Both passages approved by L. Ch. Chelmsford in *Wark v. Bargaddie Co.*, 3 Macq. 467, 477, 479, *supra*, p. 99; and see also Kirkpatrick *there*.

¹⁹⁵ Cf. *Skeen*, 1637, M. 8401; *Forbes v. Wilson*, 1873, 11 M. 454; *Sutherland & Co. v. Hay*, 1845, 8 D. 283; *Sharp v. Napier*, 1822, 1 S. 477 (N.E. 444); with the other cases, *infra*, pp. 114-6.

¹⁹⁶ *Skeen*, *supra*, 195.

¹⁹⁷ *Emslie v. Duff*, 1865, 3 M. 854, 866, *per L. Ardmillan*; and see *Pratt v. Aber-*

crombie, 1858, 21 D. 19.

¹⁹⁸ *Gardner v. Beresford’s Trs.*, 1878, 5 R. 638, aff. 5 R. (H.L.) 105 (formal lease reduced).

¹⁹⁹ See in other departments of the law. *Ballantyne v. Carter*, 1842, 4 D. 419; *Johnston v. Grant*, 1844, 6 D. 875, 7 D. 390; *Ch. of England Ass. Co. v. Wink*, 1857, 19 D. 1079.

²⁰⁰ *Infra*, p. 116, *Bell v. Goodall and Gardner v. Beresford’s Trs.*, *supra*, 160, 198.

Unequivocally
referable to the
agreement.

The chief difficulty in practice is to show that the proceedings founded on were 'unequivocally referable' to the prior agreement. And, on account of the fact that there is always the possible alternative of a lease for not more than a year as the true or a possible foundation for the actings of parties, the problem is usually reduced to showing that these actings were consistent only with the existence of a bargain for a longer period. To prove mere possession is therefore not enough, for possession may always be ascribed to the minor tenure.²⁰¹ The circumstance that this obvious consideration has been frequently lost sight of has given rise to a great deal of misconception.²⁰² The function of possession, as has been, and as will be shown, is, first, to clinch a bargain already perfected on the landlord's side; ²⁰³ second, to help in converting a personal into a real right; ²⁰⁴ and third, to perfect an assignation.²⁰⁵ Most of the cases in which possession alone was founded on for the present purpose probably belonged, if we knew the full details, to the first category, the landlord's writ being holograph or tested. Where that does not seem to have been the fact,²⁰⁶ the cases have been overruled.

Forms of *rei*
interventus.
Tenant's im-
provements.

The usual *rei interventus* consists of improvements made by the tenant. The rule was laid down early in this century in these words: 'The ordinary improvements in the way of better 'culture and management of the lands were not a sufficient *rei interventus* to bind a verbal bargain of set for a term of years; 'yet the case was otherwise with proceedings of the kind (erecting 'a building for £60 on subjects let for £12, 12s.) here founded 'upon, which are referable only to a bargain for a term of years, 'and should not have been permitted unless the bargain was to 'be implemented.'²⁰⁷ Each case will depend on its own circumstances, the main elements being the amount and expense of the melioration, the amount of the rent, and the duration alleged. The decisions do not afford much assistance. Land-

²⁰¹ 1 B.C. 328; B. Pr. 1189, 1190; More's Notes, 244; Tait, Evid. 231; Clark v. Lamont; Macrorie v. Macwhirter, *supra*, ¹⁸⁵; Fowle v. M'Lean, 1868, 6 M. 254.

²⁰² Mr. Hunter's whole exposition is thus vitiated, i. 415 *et seq.*

²⁰³ *Supra*, p. 91.

²⁰⁴ *Infra*, p. 121.

²⁰⁵ *Infra*, chap. ix.

²⁰⁶ See M'Morran v. Black, 1624, M. 16830, 17012; Duncan v. Barron, 1752,

M. 15177, 16984 (a bundle of heresies); Grant v. Richardson's Reps., 1788, M. 15180; Sievwright v. Scott, 1796, Hume 790; Rose v. Ross, 1790, Hume 774; D. Gordon v. Carmichael, 1800, Hume 805; M'Arthur v. Simpson, 1804, M. 15181.

²⁰⁷ *Per curiam* in Macrorie v. Macwhirter, 18th Dec. 1810, F.C. 86, followed in Clark v. Lamont, 27th Jan. 1816, F.C. 72; Philip v. Cumming's Trs., 1869, 7 M. 859, and see Keir v. D. Athole, 1815, 6 Pat. 130.

lords have been held not to be bound by allowing a building to be converted into a meeting-house, through the alteration of partitions and erection of pews;²⁰⁸ nor by allowing a small outlay on a farm-stead and inclosures;²⁰⁹ while as sufficient *rei interventus* have been recognised such improvements as these: contributing carriages;²¹⁰ liming, enclosing, and improving a moor at large outlay;²¹¹ turning a field into garden-ground by trenching and planting fruit-trees and shrubs;²¹² leading lime;²¹³ boring for mineral, in the case of a mineral lease;²¹⁴ cutting whins, draining, carrying lime, and making a barn;²¹⁵ erecting a barn, making a mill-lade, and certain other alterations;²¹⁶ making dykes and other improvements;²¹⁷ forming an avenue across a small piece of land let for the purpose;²¹⁸ taking down ruinous cottages, so that the landlord may use up the materials, driving tiles, and importing manure and lime at great expense;²¹⁹ and building dwelling-houses on small allotments.²²⁰ It may be anticipated that the statutory security for indemnification for outlay on certain improvements, introduced by the Agricultural Holdings Acts, 1883,²²¹ will largely impair the value of these as *indicia* of the true duration of a tenant's holding. Apart from that Act, there would be a valid claim Damages. in equity for reimbursement of money spent on meliorations, so far as *in rem versum* of the landlord, if so spent on the faith of a contract of which there is no proof but parole,²²² and sometimes this is expressly stipulated.²²³ In other respects no damages are due for exercising the privilege of resiling.²²⁴

Other forms of *rei interventus* have been these: providing *Rei interventus other than improvements.*

²⁰⁸ *Mackenzie v. Trotter*, 1729, M. 8437.

²⁰⁹ *Clark v. Lamont*, *supra*, 207.

²¹⁰ *Haly v. Sands*, 1749, M. 16354, Elch. (Tack) 15.

²¹¹ *Grieve v. Pringle*, 1797, M. 5951.

²¹² *Campbell v. Dougal*, 1813, Hume 861.

²¹³ *Drummond v. Scott*, 1787, 1 Bell, Leases, 306 (taken along with entering on a submission about marches, the landlord concurring).

²¹⁴ *Sinclair v. Mossend Iron Co.*, 1854, 17 D. 258.

²¹⁵ *Murdoch v. Moir*, 18th June 1812, F.C. 692.

²¹⁶ *Emslie v. Duff*, 1865, 3 M. 854.

²¹⁷ *Cs. Moray v. Stewart*, 1772, M. 4372, 15179, rev. 2 Pat. 317.

²¹⁸ *Forbes v. Wilson*, 1873, 11 M. 454.

²¹⁹ *Bathie v. L. Wharmcliffe*, 1873, 11 R. 490. The improvements in *Neill v. E. Cassillis*, 22nd Nov. 1810, F.C. 40; the enclosing in *Gowans' Trs. v. Carstairs*, 1862, 24 D. 1382; and the piggeries in *Walker v. Flint*, 1863, 1 M. 417, would probably have been sufficient *rei interventus*, if that could have been pleaded.

²²⁰ *Campbell v. M'Kinnon (Tobermory)* 1867, 5 M. 636, aff. 8 M. (H.L.) 40.

²²¹ 46 & 47 Vict. c. 62; Appx. hereto ii.

²²² See *Walker v. Milne*, 1823, 2 S. 379 (N.E. 338); *Bell v. Bell*, 1841, 3 D. 1201.

²²³ *Skeen*, *supra*, 195; *Pollock v. Craig*, 1763, 5 B.S. 621.

²²⁴ *Sproul v. Wilson*, 1809, Hume 920; *Dallas v. Fraser*, 1849, 11 D. 1058.

recruits for the landlord's regiment; ²²⁵ paying grassum; ²²⁶ and paying a rent larger than that which was payable under a former lease, if for the purpose of the new bargain that lease was given up by the tenant before its natural termination, the *ratio* being that the increment of rent during the surrendered years was a grassum, only explicable on the supposition of a new lease for years. ²²⁷ An increase of rent supervening at the natural close of a lease can scarcely be said to indicate a new lease for years any more than a yearly tack; ²²⁸ and a recent case in which this was the only *rei interventus* may therefore be deemed to be wrongly decided. ²²⁹ A landlord who allows a sublease for a term of years to be granted with his full cognisance, to be followed by possession, and to go unchallenged for a considerable period is barred from resiling. ²³⁰ Conversely, a tenant who sees the subject let taken out of the market, so that the opportunity and season of letting slips past, will not be allowed to repudiate his bargain; ²³¹ but whether it will be set up for his full stipulated duration or only for a year will, it is suggested, depend largely on circumstances.

Correspondence with the writ.

Before possession under it.

Duration of the lease.

It is not necessary that the actings founded on should be in accordance with express stipulations in the writ adduced; but, if such be the case, the connection of causality between agreement and performance is the more distinct. ²³² The *rei interventus* may take place, before possession in virtue of the imperfect contract is possible, as during possession under an old lease and in contemplation of a new one. ²³³ The same rules as to *rei interventus* apply whether the lease alleged to have been agreed on is of ordinary or of extraordinary endurance. ²³⁴

²²⁵ Campbell v. M'Pherson, 1793, Hume 786.

²²⁶ Macrorie v. Macwhirter, *supra*, ²⁰⁷. See Burnet v. M'Kimming, 1835, 14 S. 74; E. Aboyne v. Ogg, 1810, Hume 847.

²²⁷ E. Aboyne v. Ogg, *supra*, ²²⁶.

²²⁸ See Campbell v. Robertson, 1797, noted in Hume 849; Paterson v. Burton, 1711, 4 B.S. 830. This element was not required for the decision in Ballantine v. Stevenson, 1881, 8 R. 959.

²²⁹ Sellar v. Aiton, 1875, 2 R. 381.

²³⁰ Bell v. Goodall, 1883, 10 R. 905.

²³¹ Illustrations used in Sutherland v. Hay, 1845, 8 D. 283, where, however, this was only one of a number of elements and the lease was only for a year.

²³² Bathie v. L. Wharnccliffe, *supra*, ²¹⁹; Keir v. D. Atholl, 1815, 6 Pat. 130.

²³³ Murdoch v. Moir, 8th June 1812, F.C. 692.

²³⁴ Gowans' Trs. v. Carstairs, 1862, 24 D. 1382.

CHAPTER V.

LEASE AS A REAL RIGHT.

LEASES—originally and in their nature merely personal contracts Act 1449, c. 17.
 —were in certain cases converted into real rights¹ by the operation of the old Act 1449, c. 17, as liberally construed by the Court.² The Act is thus conceived:—‘It is ordained for the ‘safetie and favour of the puir people that labouris the ground, ‘that they, and all utheris that hes taken or sall take landes in ‘time to cum fra lordes, and hes termes and zeires thereof, that ‘suppose the lordes sell or annaly that land or landes, the takers ‘sall remaine with their tackes, unto the ischew of their termes, ‘qubais handes that ever thay landes cum to for siklike mail as ‘they tooke them for.’³

The order of exposition will be to explain—I. Against what Order of treatment.
 persons tenants are thus protected (‘qubais handes that ever thay ‘lands cum to’), and II. What are the requisites for the creation of this real right, these being—(1) That the lease (when for more than a year) shall be in writing; (2) That the subject matter of it be land or those adjuncts, which are styled *fundo anneva*; (3) That the lessee shall be in possession; (4) That the lease shall have an ish or termination expressed, or in other words shall be of a defined duration; and (5) That a rent shall be stipulated.

I.—AGAINST WHOM THE STATUTE GIVES TENANTS PROTECTION.

The Act comes into operation if the landlord ‘sells or alien- ‘ates’ the land. It was not required for protection against the

¹ The phrase is convenient though not quite accurate; see *per* L. Neaves in *Edmond v. Reid*, 1871, 9 M. 782.

² Balf. 200; Cr. 2.10.2-10; St. 2.9.2; see Brodie’s Note to sect. 43; Mack. 2.6.5, and Obs. 37; Ersk. 2.6.23 *seq.*;

Bankt. 2.9.1 *seq.*; 2 Ross’ Lect. 476; 1 B.C. 65; B. Pr. 1190; More’s Notes, 244-8.

³ The Act is c. 6 in Thomson’s Ed. 2.35, and c. 18 in Glendook’s Collection.

lessor's representatives, but only against singular successors, including as construed—(1) Purchasers and creditors;⁴ (2) Heirs of entail, so long as the lease is not contrary to the law as set forth in an earlier chapter;⁵ (3) Widows, infeft in locality lands, so long as the husband's power of administration has been exercised fairly and *in bonâ fide*;⁶ (4) Superiors attaining possession by liferent escheat of their vassal, provided that leases granted after denunciation are fair and *bonâ fide* contracts;⁷ and (5) The Crown and its donataries of gifts of forfeiture, *ultima hæres*, bastardy, and escheat. Forfeiture of a vassal does not invalidate a lease when it has been clothed with possession before the commission of treason, since the fee returns to the Crown *cum suis oneribus realibus*.⁸ It is now settled that this rule applies, though the duration be extraordinary and though a grassum have been given.⁹ It seems to follow that the Crown would not be entitled to object to a lease on the ground of inadequacy of rent. The limited right of a liferenter's tenant to sit till the Whitsunday following the lessor's death will be referred to hereafter.¹⁰

Non-entry.

By the old law,¹¹ on a decree of declarator of non-entry, and by the law since 1874, on a decree in the action of declarator and for payment of a casualty which has come in its place,¹² the superior was and is entitled to take possession of the subjects feued out to the exclusion of (*inter alios*) tenants, the reason being that by the nature of feudal rights the fee must return to the superior upon the falling of the feudal casualty as entire as when he first made the grant, and that therefore the superior is not bound to regard any deed granted by the vassal without his consent before the casualty was incurred. Although the superior is entitled to remove the lessee, he cannot do so summarily, but is bound by statute to continue him in possession until the Whitsunday following the date of the decree declaring the casualty, upon payment of the stipulated rent being made by him to the superior.¹³

⁴ As to the latter, see *infra*, chap. xxiv.

⁵ *Supra*, p. 49.

⁶ *Supra*, p. 71.

⁷ St. 2.4.66, 2.9.25; Bankt. 2.9.45; Ersk. 2.5.79 (without diminution of rental); Beaton v. Scott, 1672, M. 3664.

⁸ Mack. Obs. 37; Cr. 2.10.8; St. 3.3.32; Home v. Oldhamstock's Tenants, 1570, M. 4684; Dalziel v. Caldwell Tenants, 1674, M. 4685; M. Huntly v. Grant, 1677, M. 4689.

⁹ L. Adv. v. Fraser, 1758, M. 15196,

rev. 2 Pat. 16; 1 Bell, Leases, 42.

¹⁰ *Infra*, chap. xx.

¹¹ Balf. 201; Cr. 2.9.27, 2.19.23; St. 2.9.25; Mack. 2.6.5, Obs. 37 and 104; Bankt. 2.9.2; Ersk. 2.6.26; 1 Bell, Leases, 68; 1 Bell, Conv. 616; see Byers v. Law, 1628, M. 13791, 1 Br. Sup. 262 (heir-apparent).

¹² 37 & 38 Vict. c. 94, sect. 4 (4), and Sched. B; Begg's Conv. Code, 319.

¹³ Authorities in ¹¹ construing 1491, c. 26.

Mackenzie expresses a doubt whether this will hold when the duty is only a simulate duty, and not near the rent of the land. And he expressly lays it down that the statute will not protect those who have paid their rents to the landlord 'beforehand.'¹⁴ The lessee's right is not lost, but lies dormant, or is suspended, during the non-entry, as it anciently was during the ward, and, consequently, upon the entry of the heir the lessee is entitled to resume possession, and retain it during as many years as were unexpired when he was first excluded by the superior; so that, combining the period before his exclusion with that subsequent to his resumption, the period stipulated may be completed.¹⁵ Even after the close of a liferent tack, the years of dispossession were added for the benefit of the liferenter's heir.¹⁶ It has been well said that the lessee would undoubtedly be entitled to damages for ejection.¹⁷

II.—REQUISITES OF A REAL RIGHT OF LEASE.

(1) *Writing.*

The Statute 1449, c. 17, has been read as applicable to leases ^{Writing.} for more than one year only if they be in writing.¹⁸ Leases for a year or under do not require this solemnity. The rules regarding writ laid down in the last chapter are equally applicable here, and were illustrated in large part from cases which arose between tenants and the singular successors of the landlord. It will be sufficient to add in a note the most important of these.¹⁹ An obligation to give a sitting tenant a lease for years, *if required*, does not bind a singular successor of the landlord, if the requisition was not made before the commencement of his right.²⁰ A purchaser will be bound to recognise an excambion between his author and a tenant, though only instructed by writs which

¹⁴ Mack. Obs. 104.

¹⁵ Authorities in ¹¹; Cr. 3.1.12; L. of Culter v. —, 1611, M. 16559.

¹⁶ Cunningham v. Crawford, 1670, M. 16557.

¹⁷ 1 Jurid. Styl. (3rd ed.), 668; 1 Bell, Leases, 70.

¹⁸ Balf. 202; Cr. 2.10.10 and 13; St. 2.9.4; Mack. 2.6.5, and Obs. 37; Bankt. 2.9.5; Ersk. 2.9.24, 3.2.1; 2 Ross' Lect. 475; 1 B.C. 65; 1 Jurid. Styl. (5th ed.) 565; Menzies' Lect. 822; 1 Bell, Leases, 34; B. Pr. 1190; Keith v. Johnston's Tenants, 1636, M. 8400 (donatar); Leith v. Steuart, 1776, 1 Hailes 174.

¹⁹ M. of Montrose v. Walkinshaw, 1706, M. 13515; Garioch v. Forbes, 1750, M. 15177 (*sup.* p. 90); Cs. Moray v. Stewart, 1772, M. 4392, 15179, Hailes 485; rev. 1773, 2 Pat. 317 (*sup.* p. 107); Skene v. Spankie, 1790, noted 1 Bell, Leases, 313-14 (*sup.* p. 91); Drummond v. Gow, 1779, *ibid.*; Sieve-wright v. Scott, 1796, Hume 790 (*sup.* p. 107); D. of Gordon v. Carmichael, 1800, Hume 805 (*sup.* p. 91); Arbuthnot v. Reid, 1804, Hume 815 (*sup.* p. 91); M'Arthur v. Simpson, 1804, M. 15181 (*sup.* p. 114); Burnet v. M'Kimming, 1835, 14 S. 74.

²⁰ Clerk v. Farquharson, 1799, M. 15225.

imply merely that such a transaction has taken place, or perhaps by possession alone, if the ground exchanged be of small extent.²¹

(2) *Subject*—*Lund and fundo annexa*.

Lands, &c.

The terms of the statute are limited to 'lands' alone. But under that word there are included all those subjects which are the adjuncts of land, styled *fundo annexa*, and which are held to be capable of being created into separate tenements, or, as it has been otherwise expressed, 'all heritable subjects capable of 'such open and continuous possession as may naturally suggest 'to a singular successor the existence of a lease.'²² These are mills, minerals, salmon-fishings, and similar subjects.²³

Houses.

Though houses are *fundo annexa* and may form separate tenements, this ample construction of the statute was for long held not to extend to them on account of the special reference in the Act to labourers of the ground; by the doctrine of *ejusdem generis*, as applied to its more general words (*all others*); and by the fact that in early times houses were usually let from year to year.²⁴ But these difficulties were eventually got over, on the ground of expediency and universal practice.²⁵ If a house (a shooting-lodge, for instance) be let as accessory to and for the enjoyment of a right, to which the statute has no application, there seems to be no reason for any exception to the rule that the accessory follows the principal. Were it not so, and the possession thus became severed, the value of each subject would be seriously diminished during the severance.²⁶

Ferry.

Harbour.

There can be little doubt that leases of rights of ferry or of harbour may be made effectual against singular successors of the lessors; for these also are or may be made separate tenements.²⁷

²¹ Kennedy v. Carlyle, 1836, 15 S. 102.

²² Per L. Deas in Campbell v. M'Kinnon, 1867, 5 M. 651.

²³ Mack. Obs. 37; Bankt. 2.9.1; Ersk. 2.6.27; 2 Ross' Lect. 467; 1 B.C. 65.

²⁴ Ersk. 2.6.27; 2 Ross' Lect. 504; Rae v. Finlayson, 1680, M. 10211, 15216 (but here there was no proper stipulation of rent, and the purchase preceded the term of the tenant's entry, so that the case was well decided on other grounds). Balfour and Craig are silent; St. 2.9.2, is ambiguous; Bankt. 2.9.1, *contra*.

²⁵ Waddel v. Brown, 1794, M. 10309; Clerk v. Farquharson, ²⁰; M'Arthur v. Simpson, ¹⁹; Lumsden v. Stewart, 1843, 5 D. 501, per L.O. Cunningham; Sandf. Entails, 163; 1 B.C. 65, 755; Ersk. 2.6.27, notes; Brodie's Note to St. 2.9.43; 1 Jur. Styles (5th ed.) 565; Menzies, 823; 2 Bell, Conv. 1114.

²⁶ Hunter (i. 436), *contra*, on the principle of *jus nobilium*. Greig v. Boyd, and Scott v. Boyd, 1827, 6 S. 250; 1829, 7 S. 592, did not raise the question (customs).

²⁷ See Gentle v. Henry, 1747, M. 13804.

On the other hand, a right to services, held along with a lease of land, does not transmit with it against a singular successor; nor a lease of rents, that is, of an estate already under tenantry, for that is merely a (possibly latent) assignation of the rents in return for an annual payment, and does not involve any occupation of land;²⁸ nor for the same reason, a lease of feu-duties or casualties.³⁰ In none of these cases is the creation of a separate tenement possible. Leases of the right of killing game and of fishing form the subject of a separate chapter.³⁰ It will be enough to state here that such leases (unless the subject be salmon fishing, which is a *separatum tenementum*) are held not to come within the Act. It is suggested that the contrary would be held if the whole use of the land is thereby absorbed. The rules relating to the leasing of the mansion-house and its appurtenances on an entailed estate have been already set forth.³¹

(3) Possession.

The persons whom the Act is intended to protect are, in the first place, 'the puir people that labouris the ground,' and the possession, implied in the phrase, is carried over as a requisite to the 'utheris that hes taken or sall take landes.'

Possession, as the source of jural relations, involves two elements, (1) detention or the having or holding a thing, so that as matter of fact it is under the detentor's control, with the power of excluding all others; and (2) the *animus* or intention to possess, which in the case of a tenant is the intention to possess partly for himself and partly for his landlord. These ideas are primarily applicable to the possession of corporeal subjects; but, by an obvious extension, the term is used (either alone or as *quasi*-possession) in regard to incorporeal subjects, such as fishings and shootings, in which case the *animus* is the same, and the detention is notified by the actual exclusion of other parties from the enjoyment of the right, and usually also by overt acts in exercise of the right. The possession may be *natural*, when the corporeal thing is held, or the incorporeal right is exercised, by the tenant personally or through servants; or *civil* where the thing is held or the right exercised by another person, not a mere servant, for him, as in the case of a sublease.

²⁸ 2 Ersk. vi. 27, note *; Op. of Lord Pres. in Pollock, Gilmour & Co. v. Harvey, 1828, 6 S. 913. But Gordon v. Forbes, 1774, M. 15221, is not in point, the case not being laid on the Act.

²⁹ Bankt. 2.9.1; Ersk. 2.6.27, 3.5.5; 2 Ross' Lect. 504; 1 E.C. 757; 1 Bell,

Leases, 33. But *quid juris* if the *universitas* of a large estate is let, and only a small part of it is under tenantry? would the overlease of that part be ineffectual against a purchaser?

³⁰ *Infra*, chap. xviii.

³¹ *Supra*, p. 70.

There the sublessee's possession is natural, and that of the landlord and tenant, each with a different *animus*, civil. The possession is lost by the disappearance either of the detention or of the *animus*, or of both.³²

Necessary for
real right.

The rule that possession is necessary to convert a personal into a real right in the lessee³³ is expressed in a picturesque way by the maxims: 'possession is the life of a tack,' 'possession is the sasine of the lease;' or, as put in the House of Lords,³⁴ 'Even the most formal lease or tack does not give any possessory interest in the land which it purports to demise, until the proposed lessee or taker enters into possession actual or constructive.' The mode in which it was attempted to reach this object before the passing of the Act was by taking sasine or instruments of possession on tacks, in imitation of feudal custom.³⁵ This form of security was out of place, and the attempt was given up in practice after the Act was passed.³⁶

Ratio.

The rule is founded on that principle of law which demands, in order that a transaction shall affect third parties, that there shall be some outward and visible sign, such as delivery, sasine, intimation, publication.³⁷ Possession is the only means whereby a singular successor or creditor of the landlord or a competing lessee can become acquainted with the existence of a lease, and be enabled to learn its stipulations; and the necessity for possession is the main safeguard against collusive agreements.³⁸ The effect of possession or of the want of it may appear, either in questions with creditors, or as between competing lessees, or as between tenants and the singular successors of the lessor. The last is the relation to which the statute expressly relates; but on closer examination it appears that the transactions which give rise to the two other sets of questions are in effect 'sales or alienations' of the subjects let, just as much as an out-and-out sale. As has been already intimated, questions with creditors are postponed to a later page.³⁹ Competing leases

³² See the the authorities collected in Rankine, Landownership, pp. 3-7.

³³ Cr. 2.10.7-11; Dirl. 411-12; St. 2.9.7, and 3.2.6, and St. 2.9.43, art. 2, Note *a* (by Brodie); Mack. 2.6.5, Obs. 37; Bankt. 2.9.3 and 4; Ersk. 2.6.25; 2 Ross' Lect. 488 and 500; 1 B.C. 65, 69, 755; B. Pr. 1209-11; More's Notes, 244; 1 Jurid. Styl. (5th edit.) 566. The analogy of sasine is not perfect, for sasine persists till superseded by another sasine, while possession may be

lost without conscious transfer, 1 B.C. 66.

³⁴ *Per* Lord Truro in *Hutchinson v. Ferrier*, 1852, 1 Macq. 196, 208.

³⁵ Mack. Obs. 37.

³⁶ *Ibid.*, but see *L. Adv. v. Fraser*, 1758, M. 15196, rev. 2 Pat. 66.

³⁷ St. 1.1.22; Ersk. 3.1.2; 1 B.C. 279; B. Pr. 86.

³⁸ Ersk. 2.6.25; 1 B.C. 65; 2 Ross Lect. 493, 504.

³⁹ *Infra*, chap. xxiv.

seldom occur; when they do, a posterior lease followed by possession is preferable to a prior lease upon which there has been no possession.⁴⁰

The protection given by the statute against the alienee, not of a leasehold right, but of the feu, is of more importance. It is only afforded to a tenant who has entered on possession prior to the completion—of old by sasine, now by registration—of the alienee's right; if not, the lessor has put it out of his own power to confer possession on him.⁴¹ As a consequence of this rule, tacks with a postponed date of entry are merely personal rights, and cannot stand against an infeftment taken in the interval by a singular successor of the lessor.⁴² There is no room for questions of *bona* or *mala fides*.⁴³ Probably attainder of the landlord would be regarded as completion of the Crown's right in such a question of competition.⁴⁴

Protection
against singu-
lar successor to
lessor's right.

No equivalent for possession was provided either by common law⁴⁵ or statute, till the Registration of Leases Act, 1857, was passed. This statute will be noticed more at length when treating of assignation. In this place it is enough to state that it applies to probative leases for thirty-one years and upwards, and allows of their being recorded in the Register of Sasines. It then provides (sect. 2) that—

Registration of
Leases Act,
1857.

Leases registerable under this Act and valid and binding as in a ques- tion with the granters thereof, which shall have been duly recorded as herein provided, at or subsequent to the date of entry therein stipulated, shall by virtue of such registration be effectual against any singular successor in the lands and heritages thereby let, whose infeftment is posterior in date to the date of such registration; provided always that except for the purposes of this Act, it shall not be necessary to record any such lease as aforesaid, but that all such leases which would, under the existing law prior to the passing of this Act, have been valid and effectual against any such singular successor as aforesaid, shall, though

Recorded
leases effectual
against singu-
lar successors
in the lands
let.

⁴⁰ St. 2.9.7; Mack. Obs. 37; Bankt. 2.9.3; Ersk. 2.6.25; 1 Bell on Leases, 52; McMillan v. Gordon, 1627, M. 7018, 15229; Kerr v. Lord Ramsay, 1620, M. 15227, overruling Wardlaw v. Otterburn, 1585, M. 15227.

⁴¹ Cr. 2.10.7-11; Ersk. 2.6.25; 1 B.C. 66; Wallace v. Harvey, 1627, M. 67 (appriser's sasine prevailed over overlessee's execution—it went no further—of mails and duties); Fraser v. Ly. Pitsligo, 1611, M. 6425, 15227 (sale and infeftment). The effect of a lease granted by one unin-

feft is considered, *supra*, p. 43.

⁴² Hamilton v. Tenants, 1632, M. 15230 (postponed till redemption of a wadset); Johnston v. Cullen, 1676, M. 15231 (postponed till lessor's death—wadsetter infeft during his life).

⁴³ Home v. Oldhamstock's Ten., 1570, M. 15226, is overruled by the foregoing cases.

⁴⁴ Gentle v. Henry, 1747, M. 13804.

⁴⁵ Recording in the old Register of Reversions had no effect; Dirl. and Steuart, 29.5.

not recorded, be valid and effectual against such singular successor, as well as against the granters of the said leases.

Recorded leases are preferable *inter se* according to their dates of recording (sect. 12). And sect. 16 provides⁴⁶ that—

Registration
equivalent to
possession.

The registration of all such leases, assignments, assignments in security, translations, adjudications, writs of acknowledgment and notarial instruments as aforesaid, in manner herein provided, shall complete the right under the same respectively, to the effect of establishing a preference in virtue thereof, as effectually as if the granter or party in his right had entered into the actual possession of the subjects leased under such writs respectively, at the date of registration thereof.

A collation of the two sections here quoted suggests that questions of preference between a recorded lease and a lease possessed on but not recorded, would be determined according to the priority in time of the registration and of the first lawful possession.⁴⁷

(4) *Definite Ish.*

The usual or ordinary endurance of a lease varies from a week in certain small dwellings by a gradually ascending scale through leases of larger dwellings, furnished or unfurnished, fishings, shootings, factories, pastoral farms, arable farms, farms let on improving leases, and minerals, to land let for building purposes where the ordinary term is ninety-nine years.⁴⁸ The old Act says, and has been construed as saying, nothing to regulate or restrict freedom of contract in regard to the length of the period. All that it says is that it is enacted in favour of such tenants as 'hes termes and zeires thereof' (of lands taken) and that 'the takers sall remaine with their tackes unto the ischew 'of their termes.' These words have been uniformly interpreted as demanding a fixed duration. But the period may either be a certain number of years or the lifetime of the granter, of the grantee, or probably of third parties.⁴⁹

Perpetual
lease.

Therefore, in our earlier law there was never any doubt that a perpetual lease was invalid in a question with singular

⁴⁶ See *Rodger v. Crawfords*, 1867, 6 M. 24.

⁴⁷ Begg's Conv. Code, 454.

⁴⁸ See the *Queensberry cases*, *supra*, p. 51; 1 B.C. 68; B. Pr. 1195.

⁴⁹ Balf. 200; Cr. 2.10.5; Dirl. and Steu. 295; St. 2.9.16 and 27; Mack. 2.6.5, Obs. 38; Bankt. 2.9.5; Ersk. 2.6.24; 2 Ross' Lect. 488-93; 1 B.C.

68; B. Pr. 1194; Brodie's Stair, 369; More's Notes, 246; 1 Bell, Leases, 38-52, and 215-16; 1 Jurid. Styl. (5th edit.) 565; Menzies' Lect. 823; 2 Bell, Conv. 1210. See *Corshill v. Wilson*, 1626, M. 15188. L. Neaves' suggestion seems, therefore, wrong in a question with a singular successor—*Wilson v. Mann*, 1879, 3 R. 527, 533.

successors of the lessor, however the perpetuity might be indicated, as, for example, by a lease from five years to five years *et sic in infinitum*;⁵⁰ or for lives with an obligation on the lessor and his successors to grant leases in all time coming at the same rent;⁵¹ or to endure 'perpetually and continually as long as the grass groweth up or the water runneth down';⁵² or 'for ever';⁵³ or to the original tenant's 'bairns' so long as they were able to pay the duty.⁵⁴ In two well-known cases in last century the rule was, if not expressly recognised, yet not impugned. In the earlier of the two, a lease granted for two nineteen years, with an obligation on the granter, his heirs and successors, to renew it after that time, from nineteen years to nineteen years, in all time coming, upon the tenant's paying a certain sum as grassum at each renewal, was found obligatory upon a singular successor; but the *ratio* of the judgment was that he had accepted a disposition of the lands subject to an express exception of this very tack, and containing an express assignation of the disponent's interest under it, with right to quarrel the tack on any ground not inferring warrandice—which a reduction by the disponent certainly would have done—and was thus barred *personali exceptione* from objecting.⁵⁵ In the later case, a lease granted from nineteen years to nineteen years, as long as the lessee should desire to possess and should pay the rent, was sustained against a singular successor; but homologation was the ground of the decision, the landlord and his ancestors having allowed the lease to stand without cavil for about 100 years; and there was much difference of opinion on the Bench as to whether perpetual should be recognised like very long leases as protected by the Act.⁵⁶ It may be suggested that the express terms of the statute draw a plain distinction. It appears, however, that a lease granted for a fixed period or periods, and at the close thereof, to be renewable for ever or indefinitely, will be enforced against a singular successor, so long as the fixed period has not lapsed, leaving over the question whether renewal could then be demanded.⁵⁷

Wight v. E.
Hopetoun.

Scott v.
Straiton.

Tobermory
leases.

Leases as
securities for
debt—termin-
ation inde-
finite.

⁵⁰ Crichton or Stewart v. Viscount of
Ayr, 1631, M. 11182, 15191.

⁵¹ Oswald v. Robb, 1688, M. 15194.

⁵² Carruthers v. Irvine, 1717, M.
15195.

⁵³ Ker v. Waugh, 1752, M. 10307,
15185; L. Garlies v. Stewart, 1615,
M. 15187, went too far, see *supra*, p. 102.

⁵⁴ Hamilton v. Tenants, 1626, M. 15188,
sed quare?

⁵⁵ Wight v. Earl of Hopetoun, 1763,
M. 10461, 15199.

⁵⁶ Scott v. Straiton, 1771, M. 15200,
aff. 3 Pat. 666.

⁵⁷ Campbell v. M'Kinnon, 1867, 5 M.
636, 652, 655, aff. 8 M. (H.L.) 40.

securities for debts, by granting them to endure indefinitely until the money should be repaid, or with an obligation not to remove the tenant till then, and allowing him to retain the rent in extinction of the interest, or of both principal and interest.⁵⁸ The weight of authority among the institutional writers⁵⁹ is greatly in favour of the view that such leases or obligations are not valid in a question with singular successors of the lessor; and there is a catena of cases to the same effect,⁶⁰ interrupted by two contrary decisions, which must be regarded as now overruled.⁶¹ It does not matter whether the rent be less than, equal to, or more than the interest due, though it was at one time held that in the last state of facts the lease would be a real right, its ish being calculable as the date when the surplus rent would wipe out the capital.⁶² If a lease embraces two periods, a fixed term of years, and thereafter until debt be paid, the Act will protect the tenant against singular successors during the fixed period, but no longer. The circumstances in which this has been held have varied. In some cases the lease has been for so many years at a fixed rent, the tenant retaining out of it interest on a debt, and being entitled to keep the farm till the capital is paid.⁶³ Or the rent may be equal to the interest, and the tenant be entitled to a prorogation of the lease from year to year after the fixed period, until the debt shall be paid.⁶⁴ The lease in its earlier part is a real right; in its later part a mere 'personal obligation.'⁶⁵

Leases for long periods.

The cases in which, and the extent to which, a power of leasing is restricted with respect to duration, by personal incapacity, by limited title, and by the rules of good administration, have been explained in the First Part of this work. If, on the other hand,

⁵⁸ 2 Ross' Lect. 502; 1 B.C. 71.

⁵⁹ Cr. 2.10.11; Steuart in Dirleton and S. 295; Mack. Obs. 38; St. 2.9.28; Ersk. 2.6.24; 1 B.C. 71; B. Pr. 1194 *et seq.*; More's Notes, 246; Dirleton alone is *contra*.

⁶⁰ Rollock, 1614; Muckal v. Tenants, 1621; Partoun v. Tenants, 1621, all in M. 15234.

⁶¹ Ronald v. Strang, 1625, M. 15236; Cockburn v. Sampson, 1698, M. 15247; Hardies, 1627, M. 15190; Bennet v. Turnbull, 1628, M. 15237, 2181; Geichen v. Walkinshaw, 1629, M. 15238; Ley v. Kirkwood, 1629, M. 7195; L. Clackmanan v. Tenants of Balnaron, 1631, M. 15230; Stevenson v. Dobie, 1665, M.

15240, 1283; Seton v. White, 1673, M. 15173, and cases, *infra*,¹⁰⁵.

⁶² Cockburn v. Sampson, *supra*,⁶¹; overruled expressly in Auchinbreck's Factor v. MacLaughlan, *infra*,⁶³.

⁶³ Thomson v. Reid, 1664, M. 15239; Peacock v. Lauder, 1674, M. 15244; Mactavish (Auchinbreck's Factor) v. MacLaughlan, 1748, M. 1736, 15248; Robertson v. Spalding, 1754, Elch. (Tack) No. 20.

⁶⁴ Crs. of Douglas v. Carlyles, 1757, M. 15219; cf. case of prorogation for definite period with postponed entry; Cranstoun's Cred. v. Scot, 1757, M. 15218.

⁶⁵ Peacock v. Lauder, *supra*,⁶³.

the lessor's powers are not limited in any of these ways, it seems to be the better opinion that he can bind himself and his successors, universal or singular, by a lease of any length whatever, provided the duration be definite.⁶⁶

No doubt has ever existed that leases of any sort of lettable Cases. property to which the Act applies for ninety-nine years are valid against singular successors.⁶⁷ For building leases that is an ordinary duration. In the earliest case a lease for 2240 years was held to be beyond the purview of the statute, but there was the further objection that the rent was elusory.⁶⁸ More recently it was said to be 'generally held by lawyers that a tack 'above 100 years would not [have the benefit of the statute] and 'it is fit it should be so, otherwise these two species of rights, 'tacks and feus, would be confounded.'⁶⁹ But the case in which these observations were made did not demand a decision of the point. A judgment of the House of Lords, sustaining a lease for 1140 years, in a question with the Crown, which came in the place of a forfeited person, probably, though not certainly, proceeded on the view of the law now suggested.⁷⁰ It is difficult, moreover, to imagine what rule could be framed to discriminate between short or ordinary, and long or extraordinary leases. The Act itself makes no such distinction. Consequently leases for 999 years, or some such long period, are not unknown in practice in modern times.⁷¹

But this question, like some others discussed in this section, has now little more than a scholastic interest since the second section of the Registration of Leases Act, cited above,⁷² will, on compliance with the simple condition of registration, render effectual against singular successors leases which even actual possession would not render complete, and, among others, perpetual leases, leases of an indefinite duration, being

⁶⁶ 2 Ross' Lect. 489; 1 B.C. 68; More's Notes, 247; Brodie's Stair, p. 369. Of older writers, Balfour (203) and Craig (2.10.5) merely speak of a nineteen years' lease as an alienation, and Stair, Mackenzie, and Erskine are silent; B. Pr. 1195, is doubtful; Bankt. 2.9.6, 1 Bell, Leases, 38 seq. *contra*. The main reason against the rule is that it imperils the usefulness of the Register of Sasines. But all interested are bound to inquire into the state of possession, which is a public fact.

⁶⁷ Campbell v. Siller, 1785, M. 15223 (farm); Leslie v. Orme, 1779, M. 15530, aff. 2 Pat. 533; 2 Dow, 112 (seventy-six

years of whole estate); 1 Bell on Leases, 51-2; Campbell v. M'Kinnon, 20th March 1867, 5 M. 636, aff. 4th April 1870, 8 M. (H.L.) 40 (small holdings).

⁶⁸ Alison v. Ritchie, 1730, M. 15196.

⁶⁹ Per L. Monbodo in Jordanhill. Creds. v. E. of Crawford, 1752, Elch. (Tack) No. 18, 5 B.S. 797.

⁷⁰ L. Adv. v. Fraser, 1758, M. 15196, rev. 2 Pat. 66; and obs. thereon in 1 Hailes 404, 406, M. 15207, and 1 Bell, Leases, 43.

⁷¹ E. Elgin v. Wellwood, 1821, 1 S. Ap. 44; Welwood v. Husband, 1874, 1 R. 507.

⁷² 20 & 21 Vict. c. 26, *supra*, p. 123.

not less than thirty-one years, and leases in payment and security of debt. The only prerequisite is that the leases shall be binding in a question with the grantor.

Miscellaneous
terminations.

It is right to add a short notice of the construction put by the Court upon certain forms of declaring an *ish*. It lies upon the tenant to prove any survivance or other fact on which the duration of his tenure depends.⁷³ Under a lease to A during his life, and after his decease during the life of B, and for the space of two nineteen years after B's decease, it has been held that the fixed period began to run on the decease of the survivor, contrary, as it seems, to the plain words of the destination.⁷⁴ If there be absolute inconsistency in the terms of the *ish*, the shorter duration will be taken.⁷⁵ The lifetime of the tenant in possession at the close of a fixed period is the lifetime of the principal tenant, not of a sublessee who had the corporeal possession.⁷⁶ A lease 'to A, his heirs, and assignees, for two nineteen or thirty-eight years and crops, and after the expiration of the said two nineteen years for all the years and crops of the lifetime of the person having right to this present tack, at the expiry of the said two nineteen years,' was held to run out on the death of A, who survived the thirty-eight years, although the clause went on to describe the person having right as aforesaid, 'either as heir or as assignee appointed within' the first twenty-nine years. These words did not let in A's heir.⁷⁷ A destination to the assignees of a tenant and their 'heirs' during their lifetime, means an assignee and his first heir.⁷⁸ An *ish* may be imported by reference, and this may be done in such general terms as 'the same conditions with a former lease.'⁷⁹ A lease granted 'during the will of the lessor,' expires on his death.⁸⁰ An obligation not to remove a tenant if he gives security for the rent is valid during the lifetime of the tenant and no longer, and would not, of course, be good against a singular successor.⁸¹ An option of a lease for years or for a life or lives need not be declared till near the close of the years or of the lives; probably not even then, unless the landlord insists, for, if he does not, *res ipsa loquitur*—the tenant is entitled to the alternative which turns

⁷³ *E. Dundonald v. Glenagies and E. Mar*, 1675, M. 15193.

⁷⁴ *Bishop of Galloway v. Innes*, 1684, M. 15194.

⁷⁵ *Burnett v. Aberdeen Mags.*, 1741, 1 Pat. 305.

⁷⁶ *Ronaldson*, 18th Dec. 1812, F.C. 49; *More's Notes*, 251.

⁷⁷ *Carnegy v. Scott*, 1822, 1 Sh. App. 114; sequel, 4 W. and S. 431.

⁷⁸ *Græme v. Whytock*, 1819, in *More's Notes*, 246.

⁷⁹ *Hay v. M'Cracken*, 1807, Hume 832.

⁸⁰ *E. Moray's Reps. v. Tutors of Sanquhar*, 1583, M. 2266, 1. B.S. 120.

⁸¹ *Ferne*, 1680, M. 15193.

out to be the more favourable to him.⁸² The rules applicable to a lease without ish have been stated on an earlier page.⁸³

(5) *Rent.*

The existence and expression of a specified rent are necessary Fixed rent. to secure a lessee against singular successors. This point alone is to be considered here, leaving for future discussion the rights and obligations of parties in regard to rent. The statute entitles the protected tenants to sit 'for siklike mail as 'they took them [the lands] for;' and this has been uniformly interpreted as postulating the stipulation of *certa merces*.⁸⁴ Consequently the Act does not apply where there is either no rent at all or where the rent is merely elusory.⁸⁵ The Act contains no limitation on the power of the parties to fix the rent, but seems to sanction a lease as effectual against third parties whatever may have been the rent stipulated; nor have purchasers or creditors any ground in law for insisting that the tenant shall pay a fair and adequate rent, unless they can impugn the contract on the ground of bankruptcy; or as made in contravention of a prohibition to alienate;⁸⁶ or as transgressing the rules of ordinary administration, where the lessor has a limited or fiduciary title.⁸⁷

As there is no criterion according to which the stigma of Not elusory. elusoriness can be ascertained, the practical result is that a rent of some kind worthy of the name is essential.⁸⁸ Extraordinary duration has been coupled with elusory rent as avoiding a lease; and, where the ish was certain, the latter was probably the fatal flaw.⁸⁹ If there be a rent, the singular successor cannot complain that its amount has been diminished through the taking of a grassum, nor can he demand that the amount of the grassum should be distributed over the whole years of the lease and added to the rent.⁹⁰

The rent may consist of money, ascertained or ascertainable,— Prestations recognised as satisfying the Act.

⁸² Gray v. E. Sutherland, 1765, M. 460.

⁸³ *Supra*, p. 102.

⁸⁴ Balf. 200; Cr. 2.10.2; St. 2.9.29; Mack. 2.6.5, Obs. 38-9; Bankt. 2.9.5 and 9; Ersk. 2.6.24; 2 Ross' Lect. 494; 1 B.C. 71-2; B. Pr. 1197-1202; More's Notes, 246; Brodie's Stair, 369; 1 Jurid. Styl. (5th edit.) 566; Menzies' Lect. 823; 2 Bell, Conv. 1114; Mellerstains v. Haitlie, 1591, M. 15165; L. of Aiton v. Tenants, 1625, M. 15167; Keith v. Ogilvie, 1629, M. 15238 (tercer); and Restalrig v. Craw, 1605, M. 15166, is thus overruled; Grange-Durham, 1575, M. 15165, was a

case of liferent locality, miscalled a tack.

⁸⁵ Ersk. 2.6.24; 2 Ross' Lect. 494; 1 B.C. 72; B. Pr. 1201.

⁸⁶ 1 B.C. 72; *supra*, p. 54, as to entails.

⁸⁷ *Supra*, chap. i.

⁸⁸ B. Pr. 1201.

⁸⁹ Alison v. Ritchie, 1730, M. 15196; L. Hermistoun v. Butler's Relict, 1631, 1 B.S. 321, was a case of fixing the date of removing in a liferent lease which had run out, and had nothing to do with the statute.

⁹⁰ 2 Ross' Lect. 494; 1 B.C. 72; B. Pr. 1201; 1 Bell, Leases, 229.

in conformity with the maxim, *certum est quod certum reddi potest*—produce such as minerals (in fixed quantity or sufficient for the use of the mansion-house),⁹¹ fish, kain-fowls, whether by stipulation convertible into money or not, and services of either sort.⁹² These services must be expressly specified and the number and kinds thereof enumerated and ascertained in some written lease or by some agreement made in writing and signed by the parties or some persons authorised by them, unless they be mill-services due by law or custom.⁹³ These services were saved, when the indefinite services of feudal times—arages and carriages, hosting, hunting, watching and warding, which had been ordered to be compounded for money in consequence of Mar's rebellion⁹⁴—were abolished after the Rising of 1745.

It is thought that a stipulation requiring a tenant to pay a larger share of public burdens than usual in relief of the lessor and entitling him to deduct the amount from the rent, will transmit against a singular successor, being only a mode of payment by which no real difference is made in the obligations of the parties.⁹⁵ But more difficult questions arise where a lease contains a stipulation, or a separate agreement exists, whereby the tenant is entitled to retain the rent in whole or part in extinction of debt or in payment of interest. Another opportunity will occur of considering what conditions or covenants run with the land, and what are merely personal obligations.⁹⁶ In the present matter two propositions are quite clear. On the one hand, a lease may indirectly be so arranged as to afford a good security to the tenant for payment of the interest of a loan or even of the principal; for the rent may be fixed arbitrarily and the parties may on calculation settle a rent and fix a period which will afford to the lender full security for his interest and for a gradual extinction of his principal.⁹⁷ In other words, if a definite rent is fixed, it will not matter whether it appears *ex facie* of the agreement or otherwise that payment of debt

Retention,—
to pay
burdens;

to pay debt or
interest.

Rent fixed
though not
adequate.

⁹¹ See *Walpole v. Beaumont*, 1780, M. 15249.

⁹² The distinction admitted in sales per rental—judicial or not—does not apply in questions of elusoriness under the present Act. See 1 Hunter, 461; 1 Bell, Leases, 226; and cases in Elch. (Ranking and Sale) 1, M. 13317, 14159.

⁹³ 20 Geo. II. c. 50, sects. 21, 22. Probably the case of *Lundy v. the Smith*,

1610, M. 15166, where the engagement was to do the smith-work of the estate, would have been held to conform to this Act; cf. *Ross v. Ds. Sutherland*, 1838, 16 S. 1179, *infra*, 108.

⁹⁴ 1 Geo. I. sess. 2, c. 54, sects. 10-14.

⁹⁵ 1 Hunter, 477; *Oliphant v. Currie* *infra*, 101.

⁹⁶ *Infra*, chap. xvii.

⁹⁷ 1 B.C. 72; 2 Ross' Lect. 502.

was in the view of the parties.⁹⁸ On the other hand, if a fixed rent has been stipulated for in the lease, and then, either *unico contextu* or later, the obligation to pay it is discharged, the discharge is regarded as a purely personal contract, not transmissible against singular successors; and the fixed rent is still due in a question with them.⁹⁹ Between these two extreme cases lie others in which difficulties arise which find a ready though not entirely satisfactory solution in the rule that the singular successor is entitled to draw the full stipulated rent.¹⁰⁰ The retention in these cases does not apply to the whole rent, but leaves a surplus in money or other prestations.¹⁰¹ The rule was arrived at only after there had been a course of contrary practice.¹⁰² Thus a stipulation in a lease did not bind a singular successor which allowed £5 a-year out of a rent of £12 to the tenant for acting as ground-officer. It was very doubtful whether this stipulation would have prevented the lessor or his representatives from dismissing the tenant from this office or from stopping the abatement in that event; but there was no doubt that the obligation was no more than personal.¹⁰³ The tenant will be entitled to retain the rent due for the period before he has been legally interpellated, but no further.¹⁰⁴ These are cases in which the full stipulated rent is payable, irrespective of independent personal claims *per contra*. But where the landlord comes under some obligation to the tenant connected with the subject let—*e.g.*, to fence or otherwise specifically to improve it, and to allow retention of the rent or part of it as security for the fulfilment of the obligation, the full stipulated rent is then the gross rent, subject to this deduction, and nothing more can be demanded, either by the lessor or his representatives or by a singular successor.¹⁰⁵ It has been decided that a right of retention of this sort can be read into

Rent discharged.

Full rent, part of it withheld.

⁹⁸ See an example of this in *M'Vean v. M'Lean*, 1873, 11 M. 506, 764, where, however, the present question did not arise.

⁹⁹ *Ross v. Blair*, 1627, M. 15167; *St. 2.9.29. Seton v. White*, 1769, M. 15173, 15245, has not been followed.

¹⁰⁰ *Ersk. 2.6.24.29*; 2 *Ross' Lect. 502*; 1 *B.C. 72*; *B. Pr. 1202*; *Auchinbreck's Factor v. MacLaughlan*, 1749, M. 1736, 15248. See *Cranstoun's Credra. v. Scott*, 1757, M. 15218, 5 B.S. 830.

¹⁰¹ *Oliphant v. Currie*, 1677, M. 15245; 3 B.S. 321 (kain and public burdens).

¹⁰² *Oliphant v. Currie*, ¹⁰¹; *Seton v.*

White, ⁹¹; *Mack. Obs. 38*; 2 *Ross' Lect. 502*.

¹⁰³ *Ross v. Ds. Sutherland*, 1838, 16 S. 1179. See *Lundy, supra*, ⁹⁸.

¹⁰⁴ *Ersk. 2.6.29*; *Auchinbreck's Factor v. M'Laughlan, supra*, ¹⁰⁰.

¹⁰⁵ *Ersk. 2.6.24, 29*; 1 *B.C. 72*; *B. Pr. 1202*; *More's Notes, 246*; *Arbuthnot v. Colquhoun*, 1772, M. 10424 (inclosing); *Stewart v. M'Ra*, 1834, 13 S. 4; *L. Jeffrey's obs. in Montgomerie v. Carrick*, 1848, 10 D. 1396. *Rae v. Finlayson*, 1680, M. 10211, proceeded on an obsolete *ratio*.

a lease by 'the custom in that part of the country';¹⁰⁶ but the decision is of very doubtful authority. If the claim on which retention is pleaded arises in the interval between the entry of a purchaser and the date at which the last payment of rent to the vendor is conventionally payable, the tenant's remedy is against the purchaser, and he is not entitled to retain in a question with the vendor.¹⁰⁷

The Registration of Leases Act, 1857, again steps in to overcome many of the difficulties raised by the Act of 1449, by providing that registered long leases if good against the granters shall be effectual against singular successors;¹⁰⁸ so that an elusory rent will be no longer fatal, and the payment or securing of debt will fall under the ordinary rules of securities over feudal subjects.

¹⁰⁶ *Bell v. Lamont*, 14th June 1814, F.C. 645; see 1 B.C. 74; B. Pr. 1202.

¹⁰⁷ *Morrison v. Patullo*, 1787, M.

10425. *Hunter* (i. 465) took a different view, but the decision seems sound.

¹⁰⁸ 20 & 21 Vict. c. 26, sect. 2.

CHAPTER VI.

PROROGATION AND RENEWAL OF LEASES.

THE distinction between a prorogation and a renewal of a lease is said to be that in the former the only alteration on the original terms is an extension of the period—a new term to run after the lapse of the old; while in the latter the new term begins before the lapse of the old, or alterations are made in the rent or other prestations.¹ But the nomenclature is not adhered to,² and points to no difference in any principle or rule of law. The substance of the transaction in either case is a new lease entered into by and with the sitting tenant. The contract must, therefore, be constituted or instructed in one or other of the modes described in the last two chapters, with the help of the original lease in explication of the conditions agreed on.

Thus, in questions with the alleged lessor and his representatives, a letter, presumably holograph, from the landlord to a liferent tenant, promising at the end of the liferent lease to renew it as from the Whitsunday following, was held binding on the lessor's representatives without proof of express acceptance.³ A holograph memorandum by a landlord, proposing an extension for thirty years of a short tack, sent by him to his factor as authority for drawing out a new lease, was held binding on the landlord, the possession for eight years after the ish of the old tack being ascribed to this memorandum, which was communicated to the tenant, and not to tacit relocation.⁴ But neither party was bound by mere negotiations for a renewal *intra terminum*, one of the conditions never having been implemented by the tenant, and the new lease never having been delivered.⁵ And

Nomenclature.

Questions with lessor or his representatives.

¹ 2 Ross' Lect. 500.

(N.E. 380).

² See Richard v. Lindsay, 1725, M. 15217; Cranstoun's Creds. v. Scott, 1757, M. 15218, 5 B.S. 830.

⁴ M'Kenzie v. M'Kenzie, 1799, Hume 801.

³ Wilson v. Henderson, 1823, 2 S. 428

⁵ Hamilton v. D. Queensberry's Exrs., 1833, 12 S. 206.

acts which would be *rei interventus* if referable to an alleged renewal may lose their value if they take place pending the old lease.⁶ If, however, a personal contract of renewal is instructed, and cannot be enforced against a singular successor, the granter and his representatives will be liable in damages.⁷

Questions with
his singular
successors.

In questions with singular successors of the lessor, the only difficulties arise out of the rule that possession is required for the completion of the real right, and they arise with reference to the period (if there be such) between the agreement for a prorogation or renewal and the natural termination of the old lease. The prorogation will be effectual against singular successors, whose right emerges during that interval, 'if it be a new lease granted on the renunciation of the original lease, or if it is clear that the possession is to be upon the new lease from its date,'⁸ as where there is a change in the rent, and payment and acceptance of rent conform.⁹ A decision in which a mere prorogation by agreement subsequent to the lease was held good against a singular successor, can only be justified on the view that it was a mere readjustment of terms, the extension being from Michaelmas to Martinmas—a more convenient term and the term

Leases *tandem*.

of entry.¹⁰ If, on the other hand, the prorogation or renewal is to begin at the termination of the old lease, the tenant's possession during the interval referred to can only be ascribed to the old lease, and the new term will not be allowed to affect a singular successor who has meantime come into the lessor's right.¹¹ Till the commencement of the new term, there is no possession *under* the lease which it is proposed to enforce; and such possession is implicitly required by the old Act of 1449. It makes no difference whether the prorogation is endorsed on the original lease or not;¹² and whether the singular successor had notice or knowledge of its existence or not.¹³ Thus, where there were three separate tacks, each for nineteen years, the second to begin at the ish of the first, and the third at the ish of the second, and a

⁶ *Brown v. Ogilvie*, 1822, 1 S. 286 (N.E. 266) (sublease).

⁷ *Wilson v. Henderson*, *supra*, 3.

⁸ *Per* L.O. Barcaple in *Birkbeck v. Ross*, 1865, 4 M. 272, 276.

⁹ 1 Bell, *Leases*, 54; 1 B.C. 68; B. Pr. 1210; *Neilson v. Menzies*, 1671, M. 7770, 15231, if the latter report be, as would seem, the correct one.

¹⁰ *Thomson v. Terney*, 1791, Hume 780. B. Pr. 1210, doubts, justly, if the case is not founded on the speciality.

¹¹ Cr. 2.10.7, 11; Bankt. 2.9.39; 1 B.C. 68, 72; B. Pr. 1210; *More's Notes*, 245; *Ivory's Note to Ersk.* 2.6.25; *Brodie's Stair*, 2.9.43; and see *St.* 2.9.7; 2 *Ross' Lect.* 501; *Johnston v. Monzie*, 1760, 5 B.S. 877 (purchaser); *Scot v. Graham*, 1769, M. 15220 (creditors).

¹² See 1 *Hunter*, 475, on 1 Bell, *Leases*, 66.

¹³ *Johnston v. Monzie*, 11; *Birkbeck v. Ross*, 8. *Richard v. Lindsay*, 2, is *contra*.

singular successor in the lands came into right pending the second, the third tack was held to be invalid as against him, being granted '*in tempus indebitum*, viz., to begin in such a year when 'the setter had no right,' and the tacks being separate instruments.¹⁴ The doctrine was advanced a step in a case where a tack of teinds for three lives and three nineteen years contained an obligation to renew 'during as many years as was above specified.' The patron—a singular successor by Act of Parliament—was held not bound by the obligation, which was contrasted with a lease taken for successive periods of nineteen years 'because that 'was all one tack,' which was during its whole course as binding on the tenant as on the landlord; while in the case in hand the tenant at the ish of the original lease would not be bound to accept a renewal.¹⁵ A prorogation granted three years before the ish of a tack, to commence at that ish, was held invalid against creditors who had in the interval taken infektment, or had adjudged and had entered into possession by means of a judicial factor.¹⁶ And it was held, in conformity with the law in these cases, by Lord Barcaple, that, apart from the question whether sporting leases fell under the Act of 1449, a minute, entered into *unico contextu* with a lease of game for two years, agreeing that the tenant should become tenant of extended shootings at and from the ish of the lease, with option, however, to retire from the contract altogether on giving notice six months before the said ish, was not a bargain binding on a purchaser as a lease or present agreement of lease, but was simply a contract to enter into a lease at a future time.¹⁷ Here also, as in the teind case, the freedom of the tenant was an important element in the decision.

Certain decisions¹⁸ which cannot stand with those just cited, must be, and have been,¹⁹ deemed to be overruled. In all of them there was no mere promise of a renewal, but a concluded contract for a new lease to run from the termination of the old; and in none of them does the decision seem to have been

¹⁴ *L. Drum v. Jamieson*, 1602, M. 15209; followed in *Maxwell v. Tenants*, 1630, M. 15215.

¹⁵ *Dalrymple v. Hepburn*, 1737, M. 9444, Elch. (Tack) 5, 5 B.S. 190. (See in last report the question whether teinds are subject to the Act of 1449).

¹⁶ *Cranstoun's Crs. v. Scot*, 1757, M. 15218.

¹⁷ *Birkbeck v. Ross*, *supra*, ⁸. See other cases of renewable leases, *supra*, p. 125.

¹⁸ *Preston v. Duddingston Tenants*, 1604, M. 15210; *Makcarro*, 1622, M. 15213; *Richard v. Lindsay*, 1725, M. 15217.

¹⁹ B. Pr. 1210; 1 B.C. 68; 1 Hunter, 473; see *Birkbeck v. Ross*, *supra*, ⁸.

materially affected by specialties.²⁰ Without venturing to impugn what seems to be a settled rule of law, it may be allowable to suggest that where both parties are thus bound there is nothing more than a formal distinction between the tenant's position and that which he would have occupied if he had taken the precaution to renounce the old lease and take a new one for the space of the aggregate number of years of the old lease still to run and of the new lease.

²⁰ In *Richard v. Lindsay*, ², each point was separately taken up; and the criticism in 1 B.C. 68 is not borne out by the report.

CHAPTER VII.

RENTAL RIGHTS.

IT will be equally unpardonable to ignore and to enlarge on kindly (*nativi*) tenants and their rental rights. Except in Lochmaben and its vicinity,¹ the name and the institution have become, it is believed, quite obsolete. It will be sufficient to gather together in a note the authorities in our law books to which reference may be made,² and to state in the briefest possible manner what was the nature of a tenure at one time widely and frequently adopted. It seems fitting to interpolate this notice in the present place since the main *differentia* of rental rights consists in their constitution; but it will be also convenient to accumulate here all that it seems necessary to say on their scope and character, so as not to have to return to the subject.

I. RENTAL RIGHTS PROPER.

These seem to have been originally of the nature of customary heritable rights, and, at one time, to have followed the fortunes of those servile tenures which attained or retained in England the security of copyholds. They preserved, under the manor and barony, the ancient rights to the soil that were found to be difficult of adaptation to the feudal theory of interdependent tenure. The relation of 'kindliness' was either found or imitated by the Crown and the Church on their extensive domains; the notes and marks of the holding, both there and elsewhere, being services, a grassum—payable once for all or on each transmission—the necessity of residence, descent to heirs, and security

Nature of
rentals.

¹ *Infra*, p. 139.

² M. 7188-96, 10310-20, 15183-95;
2 B.S. 101; 1 Pat. 77; 30th Nov. 1808,
F.C.; 16 S. 309; 21 D. 309; Balf. 205;
Cr. 1.11.24, 2.9.24, 34; St. 2.9.15-20;

Mack. 2.6.8-10, and Obs. 247; Bankt.
2.9.41-45; Ersk. 2.6.37, 38; 2 Ross' Lect.
478-481; B. Pr. 1279-82; 1 Bell, Leases
88; More's Notes, 246.

of tenure so long as the quit-rent—an easy burden—was paid. But the stipulation of a grassum was probably never absolutely necessary. The customary services were abolished in 1747, and, by a process of degeneration, the heritable nature of the right seems to have gradually disappeared. The process culminated in the Act 1587, c. 69, passed in the year which saw the old Church lands absorbed by the Crown by annexation. This Act declared rentals on Crown lands to be ‘naked liferents;’ and the same rule came to be universally recognised as applicable to rentals on private estates also. If, however, the right was granted to the kindly tenant and his heirs, the destination came to mean that the first heir had the benefit, and that with his life the right terminated. There never was a right to assign or sublet.

Constitution.

To the constitution of the relation, writ was necessary. It might be either an enrolment in the landlord’s rental book, which had to be holograph of the landlord or of some one having his authority to grant rentals, or a formal lease (the latter alone being available against singular successors), whereby the proprietor ‘received, admitted, and rentalled his lovite A as his ‘kindly tenant.’³ Even in a question with singular successors, the mention of a definite ish was not necessary, the right, in the absence of an ish, being held to be for the tenant’s life; but a perpetual rental was not a real right. It would appear to have been requisite that there should be a definite rent, certain or ascertainable, and not elusory. Rentalling could not be initiated, but might, perhaps, be renewed by heirs of entail and tutors.

Not trans-
missible.

Assignment and subletting were excluded by the nature of the right. The usual explanation of this rule was that a rental was a personal grant vouchsafed on account of special favour; but it seems the sounder view to regard the rule as a mode of keeping settlers of native stock on the land and excluding strangers. Therefore, whether there was an express exclusion or not, every breach of this fundamental condition was void. The irritancy applied to excambions between rentallers on the same estate, but to propulsions to heirs. While an exclusion, not fenced with an irritancy, in an ordinary lease infers, in the case of a breach, only an avoidance of the deed, not a forfeiture of the lease, forfeiture of a rental right follows if either the whole or more

³ The name ‘kindly tenant’ or ‘rent-
aller’ was necessary; but was not of such
potency as to make a tenure kindly which

had stipulations inconsistent with a rent-
alling; *Wilson v. Wilson*, 1859, 21 D.
309.

than half of the subject should be assigned or sublet, as was the law before the middle of last century in the casualty of recognition. The only other forfeitures which affected rental rights were those legal irritancies which are common to all leases.

II. THE CROWN'S KINDLY TENANTS OF LOCHMABEN FOUR TOWNS.

Of these tenants it may be briefly remarked that, in spite of the advantages of feudalisation and the facility with which it can be accomplished, they still exist in considerable numbers; that they are not lessees or tenants in the usual sense of the words, being irremovable so long as they pay their rents, being at liberty to alienate either redeemably or irredeemably, and being treated in all respects as proprietors, liable to the burdens and entitled to the rights of ownership.⁴ They are thus in a very different position from rentallers properly so called.

III. RENTALS UNDER 18 & 19 VICT. C. 88.

This statute, the Dwelling-houses (Scotland) Act, 1855, which attempted to introduce a curious amalgam of feu and lease, to be called a rental-right, has been a dead-letter, probably on account of being unworkable.

⁴ The authorities are collected in *Lochmaben Tenants v. Vt. Stormont*, 1726, M. 15185, 15195, aff. 1 Pat. 77; *Irvine v. Collins*, 1795, M. 10316; *Bell, Fol. Ca.* 145;

Mounsey v. Kennedy, 30th Nov. 1808, F.C. 25; *Ms. Queensberry v. Wright*, 1838, 16 S. 439.

PART II.

RIGHTS AND OBLIGATIONS OF PARTIES DURING THE CURRENCY OF A LEASE.

HAVING thus treated of the parties to and subjects of a lease and of the modes in which the contract may be entered into, we now proceed to inquire what are the rights and obligations which arise, at common law, by statute, or by usual stipulation, out of the relation thus constituted. These rights and obligations are strictly correlative; and no inconvenience will arise from the fact that the point of view is now and again altered, according as the landlord's right or the tenant's right comes most into prominence. The division will be as follows:—

1. SUCCESSION TO AND ASSIGNATION OF LEASES; SUBLEASES
(Chaps. VIII., IX.).
2. POSSESSION (Chap. X.).
3. REPAIRS; IMPROVEMENTS; FURNISHINGS; FIXTURES
(Chaps. XI., XII., XIII.).
4. RENT; TERMS OF PAYMENT; APPORTIONMENT; REMEDIES
FOR RECOVERY (Chaps. XIV., XV., XVI.).
5. MANAGEMENT AND USUAL CONDITIONS; GAME (Chaps.
XVII., XVIII.).

CHAPTER VIII.

SUCCESSION TO THE LESSEE.

THE doctrine of *delectus personæ*, whereby the choice of a tenant made by a landlord in granting a lease was regarded as exclusive, was at one time carried so far as to deny any right of succession to the tenant's part of a tack. It arose out of the interest of the landlord to prevent a transference of the land into the hands of persons *majoris vigoris* than the original lessee, who might use their greater power for the purpose of retaining possession by force,¹ and was thus a reason for checking assignations and subleases, though in most cases none for excluding heirs. But the doctrine survived in more modern guise for the purpose of keeping out tenants of smaller pecuniary credit, of less agricultural skill, of worse dispositions or habits, or even of less congenial political bias, than the selected lessee, and in these respects an heir (especially if belonging to a large family) might easily be as obnoxious as an assignee or sublessee.² So that where a tack was not expressly taken as descendible to heirs, there was held to be no right of succession.³ The contrary was held to be finally established⁴ by a judgment which did no more than send the question to trial in a suspension of a decree of removing which proceeded on the traditional ground.⁵ It is now undoubted law that heirs of lessees succeed though not expressly called;⁶ and the same rule applies to heirs of heirs, and heirs of assignees.⁷

¹ See the chartularies referred to in 1 Hunter, 55.

² Ersk. 2.6.31; 2 Ross' Lect. 482; 1 Bell, Leases, 152; 1 B.C. 75; argument in *Alison v. Proudfoot*, 1788, M. 15290.

³ Cr. 2.10.6; Ersk., Ross, B.C., *supra*, 2; 1 Bell, Leases, 145; *Little v. Lintoun*, 1579, M. 10319; *Drum v. Niven*, 1609, M. 10320; *dub.* Bankt. 2.9.30;

contra, Steuart to Dirl. 413.

⁴ B. Pr. 1219; More's Notes, 247.

⁵ *Thomson v. Watson*, 1750, M. 10337.

⁶ Ersk. 2.2.6, 2.6.31; 2 Ross' Lect. 482; 1 B.C. 76; 1 Bell, Leases, 146, 508; *Brodie's Stair*, 2.9.43; 1 Sandf. Suc. 34; 1 M'Laren, Wills, 92.

⁷ *Tailfer v. M'Dougal*, 1811, Hume 857.

Lease vests
without
service.

The right transmits and vests for all purposes without any service;⁸ so as to enable the heir, by virtue of mere survivance, to possess,⁹ to transfer,¹⁰ to challenge his predecessor's deeds, and to sue a removing.¹¹ A title to long leases and assignations in security recorded in the Register of Sasines, under the Registration of Leases Act, 1857, may be completed by the recording of a notarial instrument by the heir, 'who shall have been served 'by general or special service' to his author. The mention of 'special' service seems to be a blunder, since a special service no longer includes a general service to the whole heritage, and the latter alone is applicable to a non-feudal right.¹² There is an alternative form, in which service is not required, and the heir's title is completed by writ of acknowledgment from the proprietor infeft in the subjects let (or, in the case of an assignation in security, from the person in absolute right of the lease), and recording the writ.¹³ But the vesting of the right is not postponed by either of the sections cited, the whole purpose of which is to secure that conveyances relating to long leases shall enter the record in order to secure a preference.

In heir-at-law. The heir who succeeds *sub silentio*, or where heirs are called without qualification, is the heir-at-law. Before conquest was abolished,¹⁴ leases fell to the heir of line, not to the heir of conquest, so that they are unaffected by the abolition. There is no distinction in the matter of succession between short and long leases, though the contrary has been maintained,¹⁵ or between leases protected by the Act of 1449 and those which are not so protected.¹⁶ It is a blunder in conveyancing to add the words 'and executors' to a destination in favour of heirs, and they are held *pro non scriptis*, at least, if there be an exclusion

⁸ St. 3.5.4 and 6; Bankt. 3.5.9; Ersk. 3.8.77; 1 B.C. 759; Scott v. Baird, 1754, M. 14376; 5 B.S. 814, aff. 6 Pat. 719; Veitch v. Young, 1808, M. Appx. Service and Conf. 4; Maule v. Maule, 1829, 7 S. 527 and Appx. to same volume; Dunn v. Dunn, 1835, 13 S. 590; M'Laren, 1.92.

⁹ Cases in M. 14374 *seq.*; Dirl. and Steu. 298.

¹⁰ Though this was once doubted; Rattray v. Graham, 1623, M. 10366, 14374; Bankt. 3.5.9; 2 Ross' Lect. 597; now settled, B. Pr. 1680; More's Notes, 319; Campbell v. Cunninghame, 1739, M. 14375; Hay v. Wood, 1801, noted in Brodie's Stair, 525.

¹¹ Scott v. Baird, *supra*, 8.

¹² 20 & 21 Vict. c. 26, sect. 8, and Sch. F; 31 & 32 Vict. c. 101, sect. 47; Begg's Conv. Code, p. 446; Mowbray's Hendry's Styles, 351. The reference to retours must be altered in conformity with the last Act, sect. 27.

¹³ 20 & 21 Vict. c. 26, sect. 7, Sched. E, and last note.

¹⁴ 37 & 38 Vict. c. 97, sect. 37; see Cr. 1.10.26; St. 3.5.10; Ersk. 3.8.15; 1 Bell, Leases, 509; B. Pr. 1671.

¹⁵ Dirl. and Steu. 136; 2 Ross' Lect. 483.

¹⁶ More's Notes, 141.

of assignees and subtenants.¹⁷ The question was in one case raised, whether a lease taken to heirs 'and successors,' secluding assignees without the landlord's consent, enabled the tenant effectually and without that consent to dispose of the lease *mortis causâ*. The decision turned on homologation.¹⁸ In opposition, however, to certain opinions delivered from the Bench, it may be suggested that more explicit phraseology must be used for the purpose of giving the very important and unusual power of unfettered settlement, and that the addition of 'successors,' as of 'executors,' must be regarded as mere surplusage. A lease, though it excludes assignees, may be propelled to the eldest son of the lessee.¹⁹

The tenant's part of a lease being one and indivisible, it will, in the event of his dying intestate and being succeeded by heirs-portioners, be allocated to the eldest on a division of the heritable estate as a *præcipuum*, but subject to her accounting to the others for their shares of the profits;²⁰ or, if no division be possible,²⁰ it will go to, and remain with, all of them possessing it *pro indiviso*, as if they were a single heir, all being entitled to the rights and jointly and severally liable to the obligations inferred by the lease.²¹ Thus, in a well-considered case, no doubt was cast on the right of sisters of a deceased tenant to claim a lease which seems to have been the only thing of value their brother possessed.²² The right is one of common, not joint, possession,²³ so that the share of each descends to her heirs instead of accreting to the others.²⁴ It has been decided that if a lease is taken for the life of the original tenant and of his heirs should he or they survive a fixed period, and, if the elder of two heirs-portioners (who both survive the said period, while the original tenant does not) dies, the lease does not subsist wholly nor come to an end wholly, but terminates only as to her part.²⁵ Mr. Bell in his 'Principles,' supports this judgment on the ground that the other heir-portioner could only succeed to the lapsing share by heirship not by accretion.

¹⁷ Lowdon v. Adam, 1805, M. App. Tack, 10. The analogy of feudal rights would make the rule general.

¹⁸ Aglionby v. Watson, 1809, Hume 845.

¹⁹ Hepburn v. Burn, 1759, M. 10409; Crawford v. Whiteford, 1778, 5 B.S. 620, B. Pr. 1219; but what if stocking and capital be not also transmitted?

²⁰ On the analogy of Ersk. 3.8.13; B. Pr. 1659; Fenton, 1523, M. 5357;

Ly. Luss, 1678, M. 15028.

²¹ B. Pr. 1219; see Deuchar, Cunningham, *infra*, p. 148; Lowdon, ¹⁷.

²² Youngs v. Gerard, 1843, 6 D. 347.

²³ Cargill v. Muir, 1837, 15 S. 408; M'Neight v. Lockhart, 1843, 6 D. 128, 136.

²⁴ See B. Pr. 1219.

²⁵ Per L.O. in Ms. Tweeddale v. Dods, 1821, in 1 Sandf. Her. Suc. 28; 2 Bell, Ill. 150.

The better opinion, however, seems to be to hold that there could be no partition of an indivisible subject, and that the lease endured so long as any immediate heir of the original tenant was in life.²⁶

Heir under disability.

If the heir be a person under disability, and a manager be appointed to take charge of the subject let, the question whether the appointment is admissible, if assignees and subtenants are excluded, will in every case depend on whether the transaction is a virtual assignation or sublease,²⁷ or, on the other hand, a *bond fide* arrangement for the management of the subject in the interests and at the risk of the heir.²⁸

Ultima hæres.

The Crown, to which accrues the caducuary right known as the right of *ultima hæres* and bastardy is not, properly speaking, an heir, but is treated as such in all respects,²⁹ except that it does not satisfy the definition of an heir in an express destination.³⁰ It is consequently not kept out by an exclusion of assignees and subtenants; and the rule is not affected by the fact that it cannot possess of itself, but must pass the right on to a donatary,³¹ who therefore succeeds as heir in right of the Crown, not as an assignee.³²

Displacement of the succession.

The heir-at-law and all right of succession may be excluded by restricting the tenant's holding to a liferent, as will be shown more at large in treating of removing.³³ And the amplest power of disappointing an heir is conferred on the lessee when the lease is at common law or by its express terms assignable.³⁴ The landlord may also retain or obtain power to oust the lessee's heir. Thus a mineral lease was qualified by a subsequent agreement that in the event of the tenant's death, the landlord, if he so wished, might resume possession at a valuation, if he should at any time be dissatisfied with the working of the mines by the tenant's representatives. A year after the tenant's death, the landlord intimated his dissatisfaction and his intention to resume. It was held that the landlord was not bound to state his grounds for being dissatisfied, and that nothing short of a plain averment of fraud or *mala fides* could let in other proof than the intimation.³⁵

²⁶ Sandford, *supra*, 25; 1 Hunter, 212.

²⁷ See Irvine v. Lyon, 1874, 1 R. 512.

²⁸ See 1 Bell, Leases, 172.

²⁹ Reg. Maj. ii. 58; Balf. 237; Skene *voce* Bastard; Cr. 1.16.30-37; Mack. 3.10.1; Ersk. 3.10.24; Goldie, 1753, M. 3183; Brock v. Cochrane, 2nd Feb. 1809, F.C. 150.

³⁰ Torrie v. Munsie, 1832, 10 S. 597.

³¹ Falconer v. Hay, 1789, M. 1355, seems to be overruled in principle by the later cases in notes ³⁰, ³¹, *supra*, p. 28.

³² Dallas, p. 104; Dirl. and Steu. 121.

³³ *Infra*, chap. xxi.

³⁴ *Infra*, p. 157.

³⁵ Houldsworth v. Brand's Trs., 1875, 2 R. 683, and see *infra*, p. 163.

In leases which descend to heirs, but are not assignable, the normal line of succession may be altered—(1) by a special destination 'in the lease itself'; or (2) by agreement with the landlord, taking the form of an alteration made *unico contextu* with the lease, or subsequent to it, or of bequest approved by him; or (3) by bequest in virtue of statutory authority. The right to succeed may be given subject to a condition, but if the landlord refrains from enforcing the condition, it will be *jus tertii* for the tenant's representatives to found on it as annulling the heir's right.³⁶

(1) Special destinations involving joint or common rights have been already adverted to, and the rights of heirs in such cases explained.³⁷ The simpler case, in which the original tenancy is held in severalty, remains to be considered. It is necessary in all cases to discriminate between words inferring a destination, and words intended merely to define the duration of the lease. Thus, a lease taken to A and his heirs-male for nineteen years and thereafter for the life of B, his second lawful son, to whatever period of years the said B's life should extend, gave no right to B in preference to a nearer heir-male; and, the words being unambiguous, evidence of the intention of parties could not be admitted.³⁸ If it be intended to exclude the common law right of an heir-at-law to succeed, unless the landlord approves of the change, the intention should be made unmistakably clear, for it will not be spelt out of a doubtful clause.³⁹ A lease to a person 'for his life and for the life of any of his sons to whom he may assign it,' does not lapse but goes to the eldest son failing any nomination.⁴⁰ As has been already shown,⁴¹ a lease for thirty-eight years and the lifetime of the person having right at the termination thereof, 'either as heir or assignee,' runs out with the life of the original tenant if he survives the fixed period, the alternative quoted being ignored.⁴² The existence of a lease descendible to heirs but not assignable being established, it will not be competent for the heir-at-law, relinquishing possession himself, to put any one else (in the decided case, his sisters) into his place by an arrangement not originally consented to by the landlord or acquiesced in by him *ex post facto*.⁴³ A destination to heirs 'secluding heirs-portioners,'

Alteration in the succession.

Special destination in the lease.

³⁶ Fraser v. Fraser, 1831, 9 S. 849.

⁴⁰ Fraser v. Fraser, 1805, Hume 819.

³⁷ *Supra*, p. 75.

⁴¹ *Supra*, p. 128.

³⁸ Dunn v. Dunn, 1835, 13 S. 590.

⁴² Carnegie v. Scott, 1822, 1 Sh. Ap.

³⁹ Crichton v. Ly. Keith, 1857, 19 D.

114.

713 (a very special case in which assignment and succession were mixed up together).

⁴³ Gray v. Low, 1859, 21 D. 293 (the case was very special, but this point is clear).

is equivalent to a declaration that the eldest heir-portioner shall succeed without division.⁴⁴

Permitted
alteration and
bequest.

(2) For the purpose of avoiding the bad effects of devolution to a minor, heirs-portioners, or a person incapable of managing, or for the purpose of keeping up the lease for the benefit of the tenant's family at large, not of his heir alone, the lease may contain power to the lessee to name an heir,⁴⁵ or to bequeath generally;⁴⁶ or such power may be granted *extrinsecus* by the landlord; or the landlord may expressly agree to or tacitly acquiesce⁴⁷ in an alteration of destination, or in a bequest by the tenant made without obtaining his consent. Power to alter or bequeath is not imparted by the usual destination in general terms to 'heirs,' if assignees be excluded.⁴⁸

Terms of be-
quest.

It is in the first place necessary to note the mode in which the tenant may give effect to his intention to alter. The tenant's right in and to a lease may be conveyed by him in a will or *mortis causâ* disposition either expressly,⁴⁹ or by general words sufficient to indicate or include the right. And now heritable estate—including leases—is in the same position as moveable estate so far as regards the mode in which it may be settled *mortis causâ*.⁵⁰ So that the only difficulty now lies in the ascertainment of the settler's intention. Thus, a clause in a tenant's contract of marriage conveying 'the whole horses, nolt, 'sheep, stocking upon this farm, household furniture, labouring 'utensils, bonds heritable or moveable, bills, promissory notes, and 'whole other effects heritable or moveable,' was held not to apply to the lease of his farm.⁵¹ Nor was a lease included in a settlement of 'all and sundry goods, gear, debts and sums 'of money, horn crop and corn crop, household furniture and 'every other thing that shall be pertaining and belonging or 'resting and owing to' the tenant.⁵² Leases are included in a settlement of 'heritages.'⁵³ A farmer's settlement appointed

⁴⁴ Op. in *Pratt v. Abercromby*, 1858, 21 D. 19. The clause in *Crichton v. Ly. Keith*, *supra*,³⁹ was explicit.

⁴⁵ *Deuchar v. L. Minto*, 1798, M. 15295; *Irvine v. Fiddes*, 1827, 5 S. 534 (N.E. 502); B. Pr. 1219.

⁴⁶ *Stewart v. Pirie*, 1832, 11 S. 139.

⁴⁷ *Darroch v. Rennie*, 1803, M. 15301 (possession by second son for sixteen years); cf. *Gray v. Low*, *supra*,⁴².

⁴⁸ *Deuchar*, *supra*,⁴⁵; *Cunningham v. Grieve*, 1803, M. 15298; 4 Pat. 571; 1805, M. App. Tack, 9, aff. 6 Pat. 16;

Lowdon v. Adam, *supra*,¹⁷; 1 B.C. 82; 1 Bell, Leases, 162; *Brodie's Stair*, p. 371; B. Pr. 1219.

⁴⁹ *Stewart v. Pirie*, *supra*,⁴⁶; *Trotter v. Hall*, 1790, Hume 878.

⁵⁰ 31 & 32 Vict. c. 101, sect. 20; and see 37 & 38 Vict. c. 94, sects. 27, 46.

⁵¹ *Cockburn v. Cockburn*, 1803, Hume 131.

⁵² *Sutherland v. Jeffrey*, 1805, Hume 133.

⁵³ *Duncan v. Raes*, 15th Feb. 1810, F.C. 583 (the distinction made in the

certain persons to be trustees 'to do everything necessary for the ' comfort of my wife and family ; that they entirely take charge ' of the farm, all means and moveables, until the youngest is ' twenty-one years of age, then to be an equal division among ' the three. . . . It must also be distinctly understood that ' should my present wife marry she shall get her legal claim, ' but shall have no influence or claim upon the children, or any ' management of the farm without the trustees' consent. The ' whole arrangements are to be through the trustees. They ' shall also have power to retain or give up the farm as they ' see it to be of most advantage to the family.' Though there was no other or direct disposition of the lease, specifically or generally, the assimilation of bequests of moveables and heritages led—it appears soundly—to the conclusion that there was sufficient evidence of an intention to convey the lease to the trustees who were therefore held entitled to it.⁵⁴ A testator, possessed of moveable estate and long leases, including a lease of a hotel in which he carried on business, bequeathed 'the whole ' of property either in money, bonds, debets, bussness, and other ' afficts whotsoever,' to his wife, whom he appointed 'heir and ' executrix.' A majority of the First Division held that the bequest did not cover any of the leases. Lord Ardmillan held that the term 'bussness' applied to the hotel and its goodwill.⁵⁵ A review of the cases relating to other sorts of heritable property since the passing of the 20th section of the Act of 1868, cited above,⁵⁶ strongly supports the view that the institution of an 'heir' should have been held sufficient to carry the leases without direct disposition.⁵⁷ It may be an element in determining the question of intention that at the date of the settlement—though not of the death—the testator possessed no lease ; or that the settlement was dated prior to the alteration of the law in 1868.⁵⁸ The presumption against evacuation of a special

judgment—of no importance to the present matter—seems untenable ; 1 Bell, Leases, 512 ; 1 Hunter, 219).

⁵⁴ Hardy's Trs. v. Hardy, 1871, 9 M. 736.

⁵⁵ Edmond v. Edmond, 1873, 11 M. 348.

⁵⁶ 31 & 32 Vict. c. 101, sect. 20 ; Pitcairn v. Pitcairn, 1870, 8 M. 604 ; Robb's Trs. v. Robb, 1872, 10 M. 692 ; M'Leod's Trs. v. M'Leod, 1875, 2 R. 481 ; Pringle, 1877, 15 Sc. L.R. 89 ; Urquhart v. Dewar, 1879, 6 R. 1026 ; Aim's Tr.

v. Aim, 1880, 8 R. 294 ; Farquharson v. Farquharson, 1883, 10 R. 1293 ; Ford's Trs. v. Ford, 1884, 11 R. 1129 ; Oag's Curator v. Corner, 1885, 12 R. 1162.

⁵⁷ At least this would probably now be held under the supervenient statute 37 & 38 Vict. c. 94, sect. 46.

⁵⁸ See Farquharson : Ford's Trs., *supra*, ⁵⁶ ; Farquhar v. Farquhar's Exr., 1875, 3 R. 71. But Paterson v. Farish, 1800, Hume 128, is of doubtful authority. The decision in Ly. Dunfermline v. the Earl, 1628, M. 3048 would not now be

destination by a subsequent general settlement⁵⁹ is illustrated by a case in which the subject destined was a lease.⁶⁰

Landlord's
veto—its
effect.

In all these questions as to the meaning and effect of bequests and alterations on destinations, it is postulated that the landlord is content to allow either the heir-at-law or the heir in the original destination on the one hand, or on the other hand the person put in his place, to succeed to the lease; and thus the heir is at liberty to dispute the effect of the provisions alleged to exclude him. If, however, there be no doubt of the tenant's intention to alter, it is competent to the landlord alone—not to the tenant's heir—to object to the new destination.⁶¹ Until challenge by the landlord the new destination subsists; if he acquiesces it is secured. But if he repudiates it, he lets in the heir to set it aside by reduction at his own hand; for the rule that a clause excluding the heir is only pleadable by the landlord does not confine the landlord, in giving effect to his right, to doing so in an action at his own instance or to which he is a party.⁶²

Statutory
powers of
bequest.

(3) By the 29th section of the Agricultural Holdings Act⁶³ it is enacted—

Bequest of
lease.

A tenant may by will, or other testamentary writing, bequeath his lease to any person (hereinafter called 'the legatee'), subject to the following provisions:—

- (a) The legatee shall intimate the testamentary bequest to the landlord or his known agent within twenty-one days after the death of the tenant, unless he is prevented by some unavoidable cause from making intimation within that time, and in that event he shall make intimation as soon as possible thereafter.
- (b) Intimation to the landlord or his known agent by the legatee shall import acceptance of the lease by the legatee.
- (c) Within one month after intimation has been made to the landlord or his known agent, he may intimate to the legatee that he objects to receive him as tenant under the lease;

If the landlord or his known agent makes no such intimation within one month, the lease shall be binding on the landlord

repeated. On the whole of this subject, see notes in Begg, Conveyancing Code, 65 *seq.*

⁵⁹ See *Glendonwyn v. Gordon*, 1873, 11 M. (H.L.) 33, L.R. 2 Sc. Ap. 317, and cases there.

⁶⁰ *Flemings v. Fleming*, 1800, M. App. Implied Will, 1.

⁶¹ *Deuchar v. L. Minto*, 1798, M. 15295; *Hay and Wood*, 1801, M. 15297;

Cunningham v. Grieve, 1803, M. 15298, 4 Pat. 571; 1805, M. App. Tack, 9, aff. 6 Pat. 16; 1 B.C. 77; 1 Bell, Leases, 168; B. Pr. 1219.

⁶² *Murdoch v. Murdoch's Trs.*, 1863, 1 M. 330.

⁶³ 46 & 47 Vict. c. 62. See Appx. No. ii. See the similar enactment in the Crofters' Holdings Act, *infra*, chap. xxiii.

and the legatee respectively as landlord and tenant as from the date of the death of the deceased tenant.

- (d) If the landlord or his known agent intimates that he objects to receive the legatee as tenant under the lease, the legatee may present a petition to the sheriff, praying for decree declaring that he is tenant under the lease as from the date of the death of the deceased tenant, of which petition due notice shall be given to the landlord, who may enter appearance, and state his grounds of objection; and if any reasonable ground of objection is established to the satisfaction of the sheriff, he shall declare the bequest to be null and void; but otherwise he shall decern and declare in terms of the prayer of the petition.
- (e) The decision of the sheriff under such petition as aforesaid shall be final.
- (f) Pending any proceedings under this section, the legatee shall have possession of the holding, unless the sheriff shall otherwise direct on cause shown.
- (g) If the legatee does not accept the bequest, or if the bequest is declared to be null and void as aforesaid, the lease shall descend to the heir of the tenant in the same manner as if the bequest had not been made.

This provision applies only to holdings which are agricultural or pastoral or partly the one and partly the other, or wholly or in part cultivated as a market-garden: and not even to these if let only during the tenant's continuance in any office, appointment or employment of the landlord (sect. 35).⁶⁴ There is thus thrown on the sheriff or sheriff-substitute a very delicate duty without further indication of the intention of the legislature than that he must be satisfied that the ground of objection to the legatee is reasonable. The section seems to confine the tenant's nomination to a single nominee, and to exclude trustees. The parties may contract themselves out of the section (see sect. 36).

It seems the better opinion, and to result from the above exposition and especially from the fact that the heir to a lease takes as heir of provision (as in entails) and takes nothing of which his predecessor's creditors could make use in the event of his renouncing, that he incurs no passive title by entering and that these creditors cannot attach the profits of the subject let so far as accruing subsequently to the death of their debtor.⁶⁵ It is quite certain that the practical results of an entail,—in

⁶⁴ The other terms are defined in sect. 42. *Campbell v. Gallanach*, 1806, there; More's Notes, 346; B. Pr. 1924.

⁶⁵ See the controversy in 1 B.C. 82;

Destination
a quasi-entail.

questions *inter heredes* only and not in questions with creditors—are obtained by an assignation or settlement on a series of heirs, under condition that the order of succession shall not be altered, and under what limitations, conditions, and restrictions soever the settlor thinks fit,⁶⁶ so long as these do not affect the contract with the landlord. Recording in the Register of Tailzies is incompetent, because the right is not feudal, and unnecessary, because the limitation is inherent and the right personal.⁶⁷ Leases of teinds and of minerals have been contained in entails of family estates;⁶⁸ and an entail of leases of lands for ninety-nine years in the form of an assignation in favour of a series of heirs called in an entail of feudal property has been recognised in one case by judgments nearly fifty years apart.⁶⁹ But, in order that the policy of the Rutherford Act might not be defeated by leases granted in lieu of feudal conveyances, that statute enacts that if a lease dated on or after 1st August 1848 is held directly or through trustees by a party of full age and born after its date he shall not be affected by conditions or limitations of entail, or intended to regulate the succession, or to restrict his enjoyment of the estate in favour of any future heir; leaving untouched the right of the landlord to enforce stipulations in his favour.⁷⁰ Thus the Act does not apply to old leases (dated before 1st August 1848); nor to persons in possession born before the date of the lease. The Act does not *ipso jure* alter the destination; that must be done by the heir, who is thus set free to do it.

*Tempus de-
liberandi.*

As an heir is now not liable for the debts of his ancestor beyond the value of the estate to which he succeeds,⁷¹ there is no longer any advantage in entering subject to specification,⁷² but the heir has still the benefit of the postponement of actions of constitution and of constitution and adjudication till six months after the ancestor's death.⁷³ Possession by the heir during that period by cultivating the land and other acts of management if they be such as are necessary and proper for the maintenance of the subject in its ordinary—it may be, fruit-producing—condition, will not necessarily be regarded as indicating an intention

⁶⁶ Sandf. Entails, 252; *per* L. Balgray in Maule, *infra*,⁶⁹ 7 Sh. Appx. p. 10.

⁶⁷ *Per* L. Braxfield in 7 Sh. 531, note; L. Balgray, *supra*,⁶⁶.

⁶⁸ L. Balgray, *supra*,⁶⁶.

⁶⁹ E. Dalhousie v. Maule, 1782, M. 10963; Maule v. Maule, 2nd Dec. 1817, F.C. 394; 1829, 7 S. 527—opinions in appx. thereto.

⁷⁰ 11 & 12 Vict. c. 36, sect. 49.

⁷¹ 37 and 38 Vict. c. 94, sect. 12.

⁷² See 31 & 32 Vict. c. 101, sect. 49. Under the old benefit of inventory, see Laird v. Grindlay, 1791, Bell, Oct. Ca. 296, *per* L.J.-C.; 1 B.C. 80; Forbes v. Ure, 1856, 18 D. 577.

⁷³ 31 & 32 Vict. c. 101, sect. 61.

to take up the lease, but it will be prudent to let the landlord know that the possession is merely tentative. If his actings pass beyond ordinary administration, they will indicate, on the contrary, his intention to adopt the lease.

The intention to take up a lease and the intention to renounce or abandon it may each be proved not only by express words but also tacitly by the heir's conduct. Abandonment has been instructed in the latter mode in several cases. Thus, an heir by acknowledging the right of certain trustees to enter, and by possessing under a missive from them, was barred from claiming the lease *quâ* heir.⁷⁴ Again, at the death of a tenant under a lease of which three years were still to run, the heir (of whose existence the landlord was ignorant) was abroad; the widow, having neither right nor obligation to remain in possession, left the farm after a few months; and the landlord, finding no one entitled, granted a new lease at a rise of rent. About the end of the three years the heir returned and claimed the surplus rent. It was held that he must be taken to have abandoned the lease, and that nothing was due to him. The grounds were that the landlord was not bound to leave the farm unlaboured, nor to apply to the sheriff for authority to let it for the three years; that if the heir did not know of his father's death till the ish of the lease, no injury was done to him, since he could not have possessed; and that if he did know of it, he having declined the risk was not entitled to the profit as he would not have been liable for any loss.⁷⁵ Abandonment by an heir was later held to be instructed by his refraining for two years to enter, during which period he was in Scotland; by his subsequently residing abroad; and by a memorandum left by him at his departure which showed that he regarded his sisters as the tenants.⁷⁶ After the ish of a tack, it will not be open to an heir, who has never entered on possession but on the contrary has allowed others to possess for their own behoof, to plead tacit relocation.⁷⁷ In such cases it is sometimes a question of fact whether the persons in actual possession are only managers for the heir or are pretended tenants;⁷⁸ and the Court will be astute to get at the true position of parties, however these may 'juggle' with words in their transactions.⁷⁹ It appears, moreover, that delay to claim possession, such as would infer abandonment if the subject was in consequence relet, will not

Proof of
abandonment
by heir.

⁷⁴ *Munro v. Munro*, 1825, 4 S. 328 (N.E. 231).

⁷⁵ *Watt v. Duff*, 1852, 14 D. 879.

⁷⁶ *Gray v. Low*, 1859, 21 D. 293.

⁷⁷ *Wilson v. Stewart*, 1853, 16 D. 106.

⁷⁸ *Gray v. Wilson*, *supra*, ⁷⁶, ⁷⁷.

⁷⁹ *Forbes v. Ure*, 1856, 18 D. 577.

have the same effect if the deceased tenant's relatives or others retain possession under the lease. Thus a delay of fourteen years during which the true heir (or one of the true heirs) was abroad and ignorant of the destination in the lease did not preclude her from claiming right to a lease which in the interval had been possessed on by the widow of the old tenant, a daughter at home, and that daughter's son successively.⁸⁰

Damages for
breach through
abandonment.

If the heir refuses to take up the lease and it has not come to its natural termination, a number of obligations have been undertaken by the tenant which remain partly unfulfilled at his death; and in lieu of fulfilment comes a claim for damages competent to the landlord against the tenant's representatives. In a decided case, there was no other heritage, and the burden was cast on the executor, as such, and on him as an individual in so far as he had personally intromitted.⁸¹ If there had been other heritage, it may be presumed that the rule of setting a debt arising out of the possessor's heritable estate against heritage would have made the heir primarily or ultimately liable. As the measure of damages⁸² has been suggested the rent due till the time under deduction of rents actually received for the same period on re-letting.⁸³ There may, however, be other outstanding obligations—in regard to repairs, improvements, and the like—for a breach of which the representatives will be liable, if injury has been thereby caused to the landlord's interests. While an offer by the executors to take up the lease would be a good answer to an action of damages for breach of the bargain so far as depending on discontinued possession, it may be rejected by the landlord and will be no answer to a claim which becomes due only at a removing.⁸⁴ Nothing turns on the omission or addition of words such as 'executors,' 'successors,' in imposing the obligation to pay rent or to perform other prestations.⁸⁵ It will be matter of construction to determine whether an obligation is one prestable once for all or is recurrent at each transmission.⁸⁶

Incidence of
burden among
representa-
tives.

The practice is almost universal in framing the rent clause of a lease to take the 'heirs, executors, and successors' of the tenant bound along with him to pay the rent; and in other

⁸⁰ *Crichton v. Keith*, 1857, 19 D. 713.

⁸¹ *Bethune v. Morgan*, 1874, 2 R. 186. (There can be no doubt that both the L.Os. were right, though there was no proper review of the question).

⁸² *L. Gifford*, 2 R. 188, seems over-scrupulous in refusing to call the action one of damages.

⁸³ *Per L. Gifford*, 2 R. 187. Subject to discount.

⁸⁴ *Scott's Exrs. v. Hepburn*, 1876, 3 R. 876.

⁸⁵ *Bethune*, ⁸¹; *Scott's Exrs.*, ⁸⁴, *per L.P. Inglis*.

⁸⁶ *Murray v. Torrie*, 1776, 5 B.S. 516.

parts of the deed to throw on the same parties the burden of fulfilling the other prestations. When the heir does not renounce, the effect of such an obligation may be stated in the words of Lord President Inglis in a cognate case of feu-contract. 'The imposition of the obligations on the vassal, his heirs, executors, and successors is read, according to inveterate practice as an obligation on himself so long as he remained vassal and lived, and after his death on his heirs and executors for payment of arrears, and on his successors in the feu for payment of the feu-duty in the future.'⁸⁷ The addition of the words 'conjunctly and severally' makes, however, an important difference, since it binds each of the persons indicated in the obligation to fulfil, not successively in their order, according to the state of things when a claim emerges, but absolutely and in any event, the same and the whole obligation.⁸⁸ And where such a clause was applied to two joint tenants, and these persons bound themselves and their *respective* heirs, executors, and successors, all conjunctly and severally, the word 'respective' was held not to have any effect in distributing the obligation, but only to import that each tenant bound his own representatives. When one of them and his representatives ceased to have any rights under the leases, the obligation still incumbent on them became of a cautionary character, entitling them to relief from the remaining tenant, or, failing relief, to a termination of the contract on the occurrence of a break in the tenants' option.⁸⁹

Terce is not due out of leases, because they are not feudal Terce rights. And for the same reason leases do not fall under the Courtesy. *courtesy*.⁹⁰ The theory of collation is wide enough to include *Collation*. among the heritable subjects, which require to be thrown into the divisible aggregate, the right of a deceased tenant under a lease;⁹¹ and there is some practice in conformity with this view.⁹² If assignees are excluded, the lease is allocated to the heir, and its value credited to the common fund for division.⁹³

⁸⁷ *Dundee Police Coms. v. Straton*, 1884, 11 R. 586, and contrast with *Miller v. Small*, 1853, 1 Macq. 345; *Gardyne v. Royal Bank*, 1853, 1 Macq. 358; *King's College v. Hay*, 1854, 1 Macq. 526.

⁸⁸ *Ibid.*

⁸⁹ *Burns v. Martin*, 1885, 12 R. 1343, rev. 14th Feb. 1887, see esp. L. Watson's judgment.

⁹⁰ *Ersk.* 2.9.49 and 52.

⁹¹ 1 M'Laren, Wills, 141 *seq.*, and

authorities there.

⁹² *M'Feggan v. Murray*, 1805, Hume 887; *Stewart v. M'Naughton*, 1824, 3 S. 351 (N.E. 250); *Robertson*, 1841, 3 D. 345; *Mitchell*, 1847, 10 D. 148; B. Pr. 1912.

⁹³ On the principle of *Gilmour v. Gilmour*, 13th Dec. 1809, F.C. 449; *Fisher's Trs. v. Fisher*, 1850, 13 D. 245; 1 M'L. Wills, 143.

CHAPTER IX.

ASSIGNATION AND SUBLEASE.

IN ordinary formal leases it is usual to provide, immediately after the nomination of a lessee and his heirs, for the admission or exclusion of assignees and subtenants, or of either of these classes of successors. Or the lease may be silent on this matter. It is proposed in this chapter to gather together the rules which regulate (1) the powers of tenants to assign and sublet; (2) the mode of rendering assignments and subleases effectual; and (3) the rights and obligations of assignees and subtenants. Leases being originally and essentially personal rights, the proper mode of conveyance of the tenant's right in them is by assignment, not disposition.¹ An assignment is a transference of a lease by the lessee, whereby he substitutes in his place another tenant who becomes entitled to his rights and bound by his obligations under the lease, he himself ceasing to be vested with the one or subject to the other. A mere offer to assign does not prevent the offerer from implementing the conditions of his lease; so that he may proceed to get the rent fixed by arbitration (if that was the agreement with the lessor) and the award will be binding on the assignee if pronounced before acceptance of the offer.² By a sublease a lessee lets the subject leased to him, or part of it, to another to hold it under him as landlord. The main distinction between the two transferences is that the cedent in the assignment ceases to be tenant; while the granter of a sublease still remains tenant of his own landlord.³ It is proposed consistently to name these three parties landlord, lessee, and sublessee, or landlord, tenant,

Assignment,
quid?

Sublease,
quid?

¹ *Per* L. Moncreiff in *Blair v. Blair*, 1849, 12 D. 115; *Menzies' Lect.* 826; 1 Bell, *Conv.* 1112.

² *Robertson v. Winans*, 1885, 12 R. 419 (sublessee).

³ *St.* 2.9.22; *Bankt.* 2.9.17; *Ersk.* 2.6.34; 1 B.C. 76; *Ronaldson*, 18th Dec. 1812, F.C. 49; *Skene v. Greenhill*, 1825, 4 S. 25 (N.E. 26).

and subtenant, without cumbering the exposition with the terms under- and over-tenant or under- and over-landlord.

I. POWER TO ASSIGN AND SUBLET.

(1) *At Common Law.*

In Scotland⁴ the doctrine that leases are *stricti juris* involving a *delectus personæ*, though relaxed in favour of succession,⁵ *Delectus personæ.* is still in force to the effect of preventing a lessee from assigning or subletting, unless expressly or by an exception known to the law empowered to do so.⁶ The rule is equally applicable to both modes of alienation.⁷

Express power to assign and sublet is usually granted by taking the lease to the tenant, his assignees, and sublessees. At first the favour was by common style limited to assignees or sublessees 'of no higher degree' than the lessee himself;⁸ but this restriction dropped aside in more peaceful times and is now unknown.⁹ If the power be merely 'to output and input tenants,' it extends to subletting only not to assigning, being intended to admit of parcelling out the subject among 'subtenants and helps,' and of removing these.¹⁰ The power of subletting will not be spelt out of a lease by way of presumed intention, as where the landlord knows that the farm, the dwelling-house on which the tenant seeks to sublet, is to be occupied as a led farm;¹¹ and the same rule will apply to assignation. The sublease, formerly confined to part only of the subject originally let,¹² may now embrace the whole of it,¹³ and that for the whole term of the lease. No argument is necessary to establish the recognised rule that a power to sublet does not imply a power to assign, since the landlord gives up the security of the original tenant

Express power.
Extent of sublease.

⁴ It is different in England, Woodfall, p. 257.

⁵ *Supra*, p. 143.

⁶ Balf. 208 (the rule referred to is not to be found in Thomson's Acts); Cr. 2.9.23, 2.10.3.6; St. 2.9.22, 26; 3.1.16; Mack. 2.6.7.8; Bankt. 2.9.11.15; Ersk. 2.6.31-33; 2 Ross' Lect. 483; 1 B.C. 76; B. Pr. 1215; More's Notes, 248; 1 Bell, Leases, 175, 187; Hume v. Lyall, 1680, M. 10391; Hunter v. Brown, 1681, 3 B.S. 387; Scrimgeour v. Mitchell, 1775, 5 B.S. 618; D. Portland v. Baird, 1865, 4 M. 10, 22; and other cases in this subsection.

⁷ The doubt in Ersk. 2.6.33 is not justified by the authorities.

⁸ See the reason, *supra*, p. 143; Spotts. Styles, 363; 2 Ross' Lect. 486.

⁹ 1 Jur. Styles (5th ed.) 566.

¹⁰ St. 2.9.22; Bankt. 2.9.15; Ersk. 2.6.33; 1 Bell, Leases, 192; 2 Ross' Lect. 486; Souper v. Wauchope, 1694, 4 B.S. 156.

¹¹ E. Glasgow v. Hamilton, 1851, 13 D. 1290.

¹² 2 Ross' Lect. 486; 1 Bell, Leases, 468; Grant v. L. Braco, 1743, M. 15279; Bowack v. Croll, 1748, M. 15280.

¹³ 1 B.C. 77; 2 Ross' Lect. 487; 1 Bell, Leases, 469; Crawford v. Maxwell, 1758, M. 15307, and case there; Trotter v. Dennis, 1770, M. 15282.

and his representatives in the latter case and not in the former. It is also settled—though there has been some difference of opinion¹⁴—that a power to assign does not include a power to sublet, the main reasons being the material consideration that injury might be caused by subdivision, and the formal argument from *expressio unius exclusio alterius*. This argument is also available, when either power is expressly excluded.¹⁵

Power to assign and sublet is implied in certain sorts of tacks by an exception at common law to the general rule. These are—

Implied
power.

(1) *Liferent Leases*; because these are regarded as conferring a more prolonged right than ordinary leases.¹⁶

Liferent and
similar leases.

(2) *Leases granted for the Duration of the Lessee's Tenure of an Office*—as to a minister during his incumbency—for the same reason.¹⁷

Leases of
extraordinary
endurance.

(3) *Farm Leases of Extraordinary Endurance*.¹⁸

There has been much difference of opinion in the history of our law as to the duration which shall or shall not be regarded as ordinary. A lease for ten years was at one time considered a long lease.¹⁹ Nineteen years were regarded as equivalent to a liferent, and consequently as a long term of endurance.²⁰ The former view has never been given effect to by the Court; the latter was given effect to late in last century so as to imply a power to sublet.²¹ It is now settled, however, that a lease of nineteen or twenty-one years is one of ordinary duration; and that a lease of thirty-seven or thirty-eight years is one of extraordinary endurance.²² There is no authority as to leases for a period intermediate between twenty-one and thirty-eight years. If such be granted, and nothing be said of power to alienate, it is probable that the power would be held to be implied,

¹⁴ Bankt. 2.9.17; 2 Ross' Lect. 486.

¹⁵ 1 B.C. 77; 1 Bell, Leases, 192, 469; More's Notes, 250; Binnie v. Sinclair, 1672, M. 10382; Rothead v. Moodie, 1687, M. 10392; Crawford v. Maxwell, *supra*, ¹³; Trotter v. Dennis, *supra*, ¹³.

¹⁶ St. 2.9.6; Mack. 2.6.7; Bankt. 2.9.11.46; Ersk. 2.6.32; 2 Ross' Lect. 484; 1 B.C. 77; 1 Bell, Leases, 186, 192; Hume v. Craw, 1637, M. 10371; Duff v. Fowler, 1672, M. 10282.

¹⁷ Pringle v. M'Lagan, 1802, Hume 808.

¹⁸ More's Notes, 249; B. Pr. 1215; and see case where a long lease was held unassignable to a stranger, but merely because it was in reality a family settle-

ment, Stevenson v. Love, 1842, 4 D. 1322.

¹⁹ Cr. 3.4.5.

²⁰ Balf. 203; Cr. 2.10.5; Dirl. and Steu. 85, 96.

²¹ Duff v. Hay, 1769, Hailes 289.

²² 1 B.C. 76; 1 Bell, Leases, 186, 191, 443; Ersk. 2.6.32, 33; Brodie's Stair, 371; Crawford v. Maxwell, 1758, M. 15307; Alison v. Proudfoot, 1788, M. 15290; E. Peterborough v. Milne, 1791, M. 15293; E. Cassilis v. Macadam, 1806, M. Appx. Tack, 14; Trotter v. Dennis, ¹³; Simpson v. Gray, 1794, M. 15294; Pringle v. M'Lagan, *supra*, ¹⁷; L. Neaves in D. Portland v. Baird, 1865, 4 M. 10, 22, should be read as speaking of agricultural, not of mercantile, subjects.

looking to the almost universal prevalence of twenty-one or nineteen years' leases, and to the probable inference that the additional possession was intended to recoup for unusual outlay in improvements.²³ Leases for more than thirty-eight years, and for indefinite periods which may extend beyond that period, as involving liferents, are *a fortiori* assignable and the subjects sublettable.²⁴

(4) *Leases of Urban Tenements.*

It is necessary to premise that the distinction between rustic Urban leases. or rural tenements and urban tenements does not result from the situation of the subject in country or town, but from its nature, according as the main subject let is the use of the *solum*, its produce, and what is naturally on or below it (*rural*); or the use of the *superficies*, of what has been by the art of man placed on the surface—viz., buildings of all sorts (*urban*).²⁵ The addition of an accessory to the main subject of lease makes no difference. Thus the existence of a farm-house does not make the farm less of a rural tenement; and the accompaniment of an area or garden does not make a villa less urban than a factory.

In urban tenements a lease implies power to the lessee to assign and sublet, unless there be an express exclusion.²⁶ This exception from the rule of the *delectus personæ* is said to have arisen from the circumstance that there was not originally the same solidarity between the lessor and lessee of a house as between the landlord and tenant of a farm; and that there may be more frequent and urgent calls to relinquish possession in the one case than in the other.²⁷ But the exception was not reached without difficulty;²⁸ and doubts have been expressed whether it would be applied in cases where, there being ample justification for a *delectus personæ*, the *ratio* of the rule failed—as in shops and taverns, and in mills or factories let with the machinery large and small.²⁹ There seems to be no justification for these

Urban and rural tenements.

Ratio of the exception.

²³ See the Montgomery Leases for thirty-one years (10 Geo. III. c. 56, sect. 1); the ordinary leases of the Rosebery Act (6 & 7 Will. IV. c. 42, sect. 1), *supra*, p. 58; and B. Pr. 1215.

²⁴ Bankt. 2.9.46; Ersk. 2.6.32; 2 Ross' Lect. 484; More's Notes, 248; Ross v. Blair, 1627, M. 10368.

²⁵ Brodie's Stair, 371; 1 Hunter, 232; and as to servitudes with the same nomenclature, 3 D. (8.1); Forbes, 2.4.3; Mack. 2.9.3; St. 2.7.5.9; Ersk. 2.9.6;

Bankt. 2.7.5.16; B. Pr. 983.

²⁶ Bankt. 2.9.12; 1 B.C. 76; 2 B.C. 32; B. Pr. 1274; 1 Bell, Leases, 184; Ersk. 2.6.31-33; Aitchison v. Benny, 1748, M. 10405; Elch. Tack, 13; Anderson v. Alexander, 10th July 1811, F.C. 327.

²⁷ Last note.

²⁸ Bankt. *supra*, ²⁶; Aitchison v. Benny, *supra*, ²⁶.

²⁹ 1 B.C. 76; B. Pr. 1274.

doubts in the case cited by Mr. Bell.³⁰ Mr. Hunter's ingenious suggestion³¹ that assignation or sublease might be admitted, if only the larger gear of a factory was let with it, while it should be held excluded if the smaller machinery, requiring greater care and skill in the use, was also let, affords a distinction too slender to support a rule of law. It would, moreover, be unfortunate if the alienability of a lease were in each case to turn on the greater or less need in the landlord's interests for a choice of tenant. It may be presumed that if the question arose, the Court would uphold the freedom of the tenant, after satisfying itself that the tenement was urban, and exclude all other inquiry. If a lease of an urban tenement is merely accessory to a larger and more valuable right, for the exercise of which it is required, and which is itself not alienable, it will follow the fortunes of the principal right. This was decided where an attempt was made to sublet an exclusive privilege of carrying on a retail trade in a village, and therewithal the inn and bakehouse in which the trading was to take place. The rent of the inn and bakehouse was entered separately from the rent for the monopoly; but this circumstance did not prevent the Court from applying the ordinary rule applicable to principal and accessory.³²

Even if let for
a year or less.

Let furnished.

There was a difference of opinion on the Bench in a case which was decided in 1825,³³ whether the exception in favour of tenants of urban tenements extended to those who held leases for a year or under. There is no authority for drawing a distinction, and there is an equal absence of principle.³⁴ But the case of a house let furnished seems to be on a different footing. The rent there consists of two different parts lumped together—the rent properly so called, and the hire for the use of the moveable property. There is no right to assign or sublet the right to use the furniture, for that is the subject of pure location, and the two contracts are inseparably bound together. Neither the complex subject nor any part of it can, it is thought, be so alienated.

(5) *Miscellaneous Leases.*

Mines.

In leases of mines and minerals the intentions of the parties as to assigning and subletting are always set out in express words,

³⁰ *E. Elgin's Trs. v. Walls, infra*, ³².

248.

³¹ 1 Hunter, 234.

³² *E. Elgin's Trs. v. Walls*, 1833, 11 S. 585.

³³ *Gordon v. Crawford*, 1825, 4 S. 95 (N.E. 97), misunderstood in More's Notes,

³⁴ See B. Pr. 1274. The practice seems to be in favour of the power, see *Murray v. M'Robbie*, 1874, Guthrie's Dec. 278.

either of admission or exclusion. If nothing should be said on the matter, the question would turn mainly, if not solely, on the duration of the lease;³⁵ and the maximum limit of an ordinary mineral lease—unassignable on that account—would probably be taken at the Rosebery term of thirty-one years.³⁶ In the only case in which the question has been discussed, it was thought to be very doubtful whether a mining lease for thirty years could be assigned without express power to that effect, that period being regarded as analogous to nineteen years in an agricultural lease.³⁷ So much depends on the mode of exercise of rights of fishing and shooting—especially when let for sport—as affecting the comfort of the landlord, his relations with farm-tenants, and the preservation of a sufficient stock, that the doctrine of *delectus personæ* seems specially applicable, and an opinion to this effect has fallen from the Bench.³⁸

Sporting
leases.

(2) *Express Exclusion of Assignees and Subtenants.*

Where assignation and sublease would for any of the foregoing reasons be admissible, the power may be withdrawn by a clause of exclusion, immediately following the destination to heirs—either in general terms ‘excluding assignees and subtenants’ or with certain variations. The effect of an exclusion in general terms has been already partly indicated. It has been pointed out that any such exclusion, however wide, is unavailing to prevent an assignation or sublease to the lessee’s heir-at-law—the equivalent of propulsiion of the fee in the feudal law;³⁹ or to exclude the Crown and its donatary coming into right by gift of *ultima heres* or bastardy.⁴⁰ Whether the exclusion is express or implied, the right of exercising it or waiving it is personal to the landlord; and, conversely, if the landlord expressly or tacitly consent or acquiesce, no one else can object.⁴¹ The only variations which require to be noticed here are—(1) where either of the two powers is omitted from the clause of exclusion; (2) where there is an express exclusion of legal assignees and of trustees and managers for creditors; (3) where there is an

Clause of
exclusion.

³⁵ See opinions of L. Cowan and L. Neaves in *D. Portland v. Baird*, 1865, 4 M. 10, 16, 19, 22.

³⁶ 6 & 7 Will. IV. c. 42, sect. 1; the limit is arbitrary but sufficiently near the truth.

³⁷ *D. Portland*, *supra*, ³⁶; see L. Cowan’s view of the bearing of breaks on the question, *ibid*.

³⁸ *Per* L. Kinloch in *E. Fife v. Wilson*, 1864, 3 M. 323.

³⁹ *Supra*, p. 145.

⁴⁰ *Supra*, p. 146. As to escheat, see *supra*, p. 16.

⁴¹ *Supra*, p. 150; *Trotter v. Hall*, 1790, Hume 878; *Deuchar v. L. Minto*, 1798, M. 15295; *Hay & Wood*, 1801, M. 15297; *M’Coag v. M’Sporan*, 1863, Hume 813; *Darroch v. Rennie*, 1803, M. 15301; *Cunningham v. Grieve*, 1803, M. 15298; 4 Pat. 571; *M. Appx. Tack*, 9; aff. 6 Pat. 16.

admission of partners; and (4) where to the exclusion is adjoined an express exception (which takes various forms) in the event of the landlord's consent being obtained.

Exclusion of
either, not
both.

(a) It has never been doubted that an exclusion of subtenants does not import an exclusion also of assignees. Although the converse rule, that an exclusion of assignees does not import an exclusion of subtenants, has been objected to⁴² and even denied⁴³—apparently by a simple blunder—it is sufficiently established by authority.⁴⁴

Bankruptcy.

(b) The effect of the bankruptcy or insolvency of the lessee on his relation with the landlord and others will form the subject of separate treatment.⁴⁵ It is enough to state here that, while adjudgers, and trustees, and factors (in a sequestration or otherwise) for behoof of creditors are not excluded by the mere presumption of law in favour of a *delectus personæ*,⁴⁶ they are shut out by an express exclusion of assignees and subtenants generally;⁴⁷ so that it is unnecessary to add (as is not unfrequently done) the words 'legal and conventional (or voluntary), and all trustees, factors, or managers for creditors.'⁴⁸

Partners.

(c) A special power is sometimes conferred to assign 'to successors or new partners in the trade or business now carried on by' the lessees,⁴⁹ in leases for manufacturing or mining purposes. Though there has been no decision in Scotland,⁵⁰ there seems to be no doubt on principle that some such clause is required to entitle a lessee to assign to a copartnership of which he is a member, or to a partner assumed.⁵¹ It would be equally incompetent, if the landlord objected, for one partner to assign all his interest to another.⁵²

Landlord's
approval.

(d) It is now settled that no alteration is made on the rights or obligations of the parties by adjecting to the exclusion, words such as these:—'without the landlord's consent,' or 'unless specially approved of by a writing under the hand of the landlord.' The

⁴² More's Notes, 248.

⁴³ B. Pr. 1216.

⁴⁴ Crawford v. Maxwell, 1758, M. 15307 (subtenants expressly called, however) and case there; Trotter v. Dennis, 1770, M. 15282; 1 B.C. 77; Brodie's Stair, p. 371.

⁴⁵ *Infra*, chaps. xx., xxiv.

⁴⁶ St. 2.9.26; Mack. 2.6.7.

⁴⁷ Elliot v. D. Buccleuch, 1747, M. 10329; Elch. Tack, 12; 5 B.S. 618; Hepburn v. Mossman, 5 B.S. 618; Cunningham v. Hamilton, 1770, M. 10410,

Hailes 369; Ersk. 2.8.8; 1 B.C. 77.

⁴⁸ See 1 Jur. Styles (5th ed.), 638.

⁴⁹ 1 Jur. Styles, 653.

⁵⁰ See Dick v. Skails, 1706; 4 B.S. 642; Borrows v. Colquhoun, 1852, 1 Stu. 733, rev. 1 Macq. 691; More's Notes, 249.

⁵¹ Roe d. Dingley v. Sales, 1 M. and S. 297; see Walker v. M'Knights, 1886, 13 R. 599.

⁵² Varley v. Coppard, L.R. 7 C.P. 505; cf. Bristol Corp. v. Westcott, 12 Ch.D. 461.

addition is really no qualification at all. The understanding of the profession in early times seems to have been, and down to the year 1820 it could be plausibly argued, that some materiality must be ascribed to words used in a solemn deed, and that the effect of the addition was to let in a judicial control of the landlord's discretion, by calling for his reasons for objecting to the proposed assignee, and overruling them if deemed insufficient.⁵³ In the earlier cases, the point did not arise purely or was not determined; ⁵⁴ though one of them, where the lease was taken to the tenant, 'his heirs, and such his assignees as the said lessor should 'approve of, excluding all others his assignees,' and an adjudger was held excluded without inquiry into the reasons for objection to him, may be fairly taken as involving the modern doctrine.⁵⁵ This doctrine was finally established, after a full examination of the earlier decisions, in a case which settled that a seclusion of 'assignees and subtenants without the landlord's consent' does not entitle the Court to inquire into or compel the landlord to adduce reasons for withholding his consent—still less to justify them.⁵⁶ The same rule was applied where the clause was conceived in favour of assignees and subtenants, 'but under 'this condition always, that if the tenants shall desire to assign 'this lease or to sublet the premises hereby let, the assignation or the sublet shall be, and shall only be, with the 'written consent of the proprietor or his successors.'⁵⁷ Certain expressions made use of on the Bench and a reservation in the judgment in a case which, the lease being a perpetual one and equivalent to ownership, was peculiarly unfavourable for a harsh exercise of the landlord's veto, point to a control by the Court over his 'caprice,' or 'abuse' of the reserved power, as to which he might 'be called on, not to justify but to exculpate himself;'⁵⁸ but these were merely *obiter dicta*, as to a matter expressly

⁵³ 1 B.C. 78; Ivory's Ersk. Bk. 2, note 107; Brodie's Stair, p. 371. The only authority was an erroneously reported decision, relating to fodder, not to assignation; D. Roxburgh v. Archibalds, 1785, M. 10412.

⁵⁴ Ly. Monkton v. Balderston, 1712, M. 673; Sanderson v. Ms. Tweeddale, 1756, M. 10407; Hepburn v. Burn, 1759, M. 10409; Irvine v. Valentine, 3 Pat. 287, and notes to 1 B.C. 78, and 1 Bell, Leases, 179; Mackenzie v. Learmonth, 1817, in note to Muir v. Wilson, *infra*,

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⁵⁵ Elliot v. D. Buccleuch, 1747, M. 10329.

⁵⁶ Muir v. Wilson, 20th Jan. 1820, F.C. 83, 1 Bell, Leases, 182 (subtenant). See Gray v. Low, 1859, 21 D. 293, 723; and Houldsworth v. Brand's Trs., 1875, 2 R. 683, *supra*, p. 146; 1 B.C. 78; B.Pr. 1218; More's Notes, 249.

⁵⁷ D. Portland v. Baird, 1865, 4 M. 10 (assignation); see Johnston v. Ramsay, 1887, Sc.W.N. 80.

⁵⁸ Wight v. E. Hopetoun, 1855, 17 D. 364, 373, 378 ('such assignees as the 'landlord shall be pleased with or approve 'of by a writing').

reserved; and they have been justly reprobated or explained away in the most recent case already referred to.⁵⁹

Evasions defeated.

If an exclusion of assignees and subtenants or of either of them is established by force of the common law or of stipulation, the Court will interfere to prevent evasion through indirect or covert alienations. Thus, a so-called deed of trust conveyed and made over a lease so far as necessary for the purposes of the trust; substituted the trustee in the grantor's full right and title with power to manage and transact; gave certain relatives a share in the produce and a residence on the lands; ordered an accounting; and sent to arbitration any controversies which might arise between the trustee and the trustor's heirs. The trustee put his own stock on the land and otherwise behaved as tenant; and he could point to no real accounting having taken place. On the lessee's death the Court, at the instance of the landlord, held that the trust-deed was a covert assignation and that the trustee (or assignee) must remove.⁶⁰ So, an arrangement made by a tenant—restricted from assigning and subletting—with a third party, that the latter should cultivate the farm by his own servants, horses, and implements without remuneration and that the tenant should remove with his family and stock, was held to be a delusive device to defeat the exclusion; and interdict was granted against its being carried into effect.⁶¹ It was held relevant to found an action of declarator of disability to assign and for removing on an express exclusion and an averment that the tenant of a shop had removed his own goods from it and allowed a person in a different trade to occupy it, the tenant's allegation that the occupier was merely his shopman being a transparent device.⁶² A deed by which a tenant gives over the management of his farm to a creditor irrevocably, binding himself to abstain from interference therein and stipulating for an accounting at the ish of the lease, is none the less an assignation, though it is called a factory and commission.⁶³

Irritancy.

If the exclusion is fortified by an irritancy, incurred in the event of breach, the penalty of extinction of the tenant's right and of his removal from the premises cannot be escaped by purgation before decree, since it is a conventional irritancy.⁶⁴ If there

⁵⁹ In *D. Portland v. Baird*, *supra*, 57, at 4 M. 18, 20, 23.

⁶⁰ *Porter v. Paterson*, 1813, Hume 862. The question left undecided whether the lessee's heirs could then resume possession would depend on the presence or absence of an irritancy, *infra*, chap. xx.

⁶¹ *Hamilton v. Sommerville*, 1855, 17 D. 344.

⁶² *Hatton v. Clay*, 1865, 4 M. 263.

⁶³ *Lyon v. Irvine*, 1874, 1 R. 512.

⁶⁴ *Lyon v. Irvine*, *supra*, 63; see *Porter v. Paterson*, *supra*, 60, *infra* chap. xx.

be no such irritancy, the assignation or sublease will be reducible, and an action of damages will lie for injury done to the landlord's interests, but the lease itself will not be brought to an end.

The landlord's right of veto may expressly⁶⁵ or by acquiescence be given up,⁶⁶ and this renunciation cannot be retracted without the consent of the other parties.⁶⁷ The right of veto may be given up conditionally, and where the assignation takes place through the tenant's sequestration, it is *jus tertii* in the bankrupt to object to conditions agreed on between his trustee (the assignee) and the landlord.⁶⁸ Veto renounced.

II.—MODE OF RENDERING ASSIGNATIONS AND SUBLEASES EFFECTUAL.

It will be found convenient to treat these two forms of alienation separately.

A. ASSIGNATION.

1. *At Common Law.*

An assignation in regular form gives a narrative of the lease more or less fully; sets forth the consideration paid by or for the assignee; and then sells, assigns, conveys, and makes over to the grantee, his heirs and assignees, the grantor's right and interest in and to the lease [or makes and constitutes the grantee, his heirs and donators, the grantor's lawful cessioners and assignees to the lease] during its whole currency and to all the consequent rights and powers, surrogating and substituting the assignee in his place, under declaration that the assignee shall be obliged to pay to the landlord the stipulated rent and to implement all the other prestations incumbent on the cedent. This grant is followed by warrandice from fact and deed and by a registration clause.⁶⁹ But much more simple forms are permissible, there being no *voces signatæ* requiring to be used. It is enough, if the intention to assign be unequivocally expressed.⁷⁰ An assignation by an assignee is a translation; if granted to his cedent, it is a retrocession;⁷¹ but these transactions do not differ in principle from other assignations, and the nomenclature is consequently unfamiliar. But where the reconveyance takes place by the merging of a sublease in the principal lease, there is this

Common style.
Translation.
Retrocession.

⁶⁵ See *Ramsay v. Commercial Bank*, 1842, 4 D. 405.

⁶⁶ See *Gray v. Low*, *supra*, ⁵⁶.

⁶⁷ *Valentine v. Ramsay*, *supra*, ⁵⁴.

⁶⁸ *Dobie v. Ms. Lothian*, 1864, 2 M. 788.

⁶⁹ 1 Jur. Styles (4th ed.) 460, 539 (5th ed.), 708.

⁷⁰ *Carter v. M'Intosh*, 1862, 24 D. 925, 933 (bill).

⁷¹ See *Ramsay v. Commercial Bank*, *supra*, ⁶⁵.

peculiarity, that the transaction does not require to be intimated to the landlord.⁷²

(a) *Completion in questions with Cedent and Landlord.*

Intimation.

The right is completed in a question with the cedent (granter) by delivery.⁷³ It is completed in a question with the landlord and his representatives by intimation, as in assignments of any other personal right or contract. The meaning is, that 'in a competition between two *bond fide* onerous assignees, the landlord is entitled till intimation to transact with the cedent, ignoring the assignee,⁷⁴ and is bound to prefer him who first intimates his assignation (which is the way of completing a personal right) and to put him in possession accordingly.'⁷⁵ It seems to be enough, however, that the assignation be *bond fide*, onerosity being merely one important element in proof thereof. Intimation in some form or other is necessary for the purpose of establishing privity of contract between the landlord and the assignee. All the more so is this the case when the right assigned is that of a lessee who has sublet the whole subject, for the assignee in that case can have no possession.

Form of intimation.

Formal intimation, as the law stood before 1862, was made by the assignee or an agent for him, in presence of a notary and witnesses, delivering to the landlord or leaving at his dwelling-house a schedule of intimation and protest; after which an instrument of intimation was extended (sometimes on the back of the assignation), and signed by the notary and witnesses.⁷⁶ If the landlord were furth of Scotland, letters of supplement were obtained, under warrant of which messengers-at-arms gave notice, formerly at the market-cross of Edinburgh and pier and shore of Leith, then at the office of Edictal Citations.⁷⁷ Since 1862,⁷⁸ intimation may also be made—either at home or abroad:⁷⁹—(1) by a notary-public delivering a copy of the assignation, certified as correct, to the person or persons to whom intimation may in any case be requisite; or (2) by the holder

⁷² Underwood v. Richardson, 1824, 3 S. 336 (N.E. 238).

⁷³ See Grant v. Gray, 1828, 6 S. 489; Ersk. 3.5.3.

⁷⁴ Burnet v. Frazer, 1673, M. 13470; (so long at least as there is no *mala fides*).

⁷⁵ Per the majority in Inglis & Co. v. Paul, 1829, 7 S. 469, 473.

⁷⁶ Balf. 169; Cr. 1.15.31; St. 2.10.17, 22; 3.3.7; Mack. 2.5.3; Bankt. 3.1.6, 12;

Ersk. 3.5.3; 1 Ross' Lect. 198; 2 B.C. 17; B. Pr. 1463-4; 2 Jur. Styles (3rd ed.) 316, 351; 1 Bell, Conv. 307.

⁷⁷ Campbell on Citation, 133, 140.

⁷⁸ 25 & 26 Vict. c. 85, sect. 2. This section does not seem to be confined to moveable rights.

⁷⁹ Prof. Montgomerie Bell's view (Lect. i. 314) seems to be sound; but if abroad both forms should be used.

of such assignation or any one authorised by him transmitting a copy thereof certified as correct by post to such person. In the first case the notary's certificate in or nearly in a form scheduled to the Act; in the second case a written acknowledgment by the recipient, shall be sufficient evidence of such intimation having been made.⁸⁰

As equivalent to formal intimation the following *facta* have Equivalents. been recognised:—(1) a probative acknowledgment by the landlord of the assignee's right; (2) citation in an action by the assignee against the landlord; (3) a charge or citation on any diligence against the landlord; (4) production of the assignation in Court in an action between them;⁸¹ not private knowledge⁸² nor registration in the Books of Council and Session or other books kept merely for preservation;⁸³ nor parole evidence either of a promise to recognise the assignee as tenant or of actual notice;⁸⁴ nor a reference to the oath of the landlord, since other interests besides his are at stake.⁸⁵

(b) *Completion in questions with Third Parties.*

A controversy has raged for a long period in our law around the question whether an assignation can be so completed by intimation alone as to be effectual not only against the landlord and his representatives, but also against his singular successors, or creditors, and against subsequent assignees, or whether possession is required in addition. The difficulty does not arise Assignment of
a principal
lease. where the possession is in the hands of sublessees and the subject assigned is the principal lease; for there the actual or natural possession remains unchanged and the civil possession is transferred from the cedent to the assignee by assignation duly intimated to the landlord, accompanied with levying the sub-rents, or sequestration for payment or in security of these, or formal intimation to the subtenant—seeing that this is all the possession possible in the circumstances.⁸⁶

⁸⁰ As to intimations to corporations, banks, joint-stock companies, copartneries, see 1 Bell, *Conv.* 315, and *Keir v. Menzies' Crs.*, 1739, M. 738, 850, 5 B.S. 656, *Elch. Arrestment*, 10; 25 & 26 Vict. c. 89, sect. 62; 8 & 9 Vict. c. 17, sect. 137; 8 & 9 Vict. c. 19, sect. 128; 8 & 9 Vict. c. 33, sect. 130.

⁸¹ St. 1.7.9.45; Mack. 2.5.5.6; Bankt. 3.1.12; Ersk. 3.5.4; 1 Ross' *Lect.* 203; 2 B.C. 17; B. Pr. 1465; More's *Notes*, 281.

⁸² The distinction in B. Pr. 1465 *ad*

fin. does not arise in cases of lease. See a case where a sublessee had knowledge of prior assignation by the lessee and his *mala fides* barred his claim to possession; *Bowack v. Croll*, 1748, M. 1695, 15280.

⁸³ *Tod's Trs. v. Wilson*, 1869, 7 M. 1100. As to the Register of Sasines, see *infra*, p. 172.

⁸⁴ 2 B.C. 18; *Brodie (Stair, p. 415) and Menzies*, p. 256, on Ersk. 3.5.4.

⁸⁵ 2 B.C. 17; but see Ersk. 4.2.9.

⁸⁶ *Supra*, p. 121; *Hume in Grant v. Adamson*, 1802, p. 813; 1 B.C. 66, 755;

In other cases. In other cases—*i.e.*, in assignments of leases not burdened with subleases and of subleases themselves—a transfer of the natural possession to the assignee is possible. The result of the controversy alluded to has been to establish that it is also necessary—as was the case in the original constitution of the lease⁸⁷—for the purpose of enabling the assigned lease to obtain or retain the character of a real right available against all the world. 'It is a general rule in the law of Scotland, that possession 'natural or civil is necessary to complete the transference of a 'real right. A tack is a real right by force of the Statute 1449 'in a question between assignees and adjudgers from the tenant.'⁸⁸ This principle of the law is equally applicable whether the assignation be absolute;⁸⁹ or in trust—in which case the trust can only be established by the writ or oath of the assignee⁹⁰—with an obligation express or implied, *in gremio* or in a back-letter, on the part of the assignee to retrocess on the accomplishment of the trust purposes;⁹¹ or lastly in security of debt.

Assignment in security for debt.

The rule in question has been mainly illustrated by cases in which the securing of debt has been the purpose of the assignation. It cannot be surprising that repeated attempts have been made to use lucrative leases, especially if of considerable endurance, as sources of credit, like any other sort of property. The importance of so utilising the lessee's interest was all the greater, where the expense of making the subject let duly profitable was great and was incurred at the commencement of the lease before profits could begin to come in. What was for the benefit of the tenant could not but accrue to the advantage of the landlord.⁹² The only difficulty or drawback was the want of that publicity which the law of Scotland demands in the transfer of heritable property, and which the Register of Sasines bestows on transfers of feudal rights. The objection was in the end held fatal, and the only solution of the problem came to be a statutory application of the system of registration for

Sime's Tr., 1806, M. Appx. Tack, 13; Douglas v. Hay's Tr., 1794, M. 2802; Bell's Fol. Ca. 50; Brock v. Cabbell, *infra*, at 8 S. 652, 5 W. and S. 479. L. Medwyn thought intimation to the subtenant enough. See question as to effect of intimation to some, not all, subtenants, Wright v. Walker, 1839, 1 D. 641.

⁸⁷ *Supra* p. 121.

⁸⁸ *Per* the majority in Brock v. Cabbell,

infra,⁹⁰ at 8 S. 652, 5 W. and S. 479.

⁸⁹ Sometimes called and treated as a sale ('sell,' 'price,' 'roup'); Swan v. Baird, 1836, 15 S. 251; 2 Jur. Styles, 485.

⁹⁰ B. Pr. 1995; 2 M'L., Wills, 72.

⁹¹ Lyon v. Reid, 1830, 8 S. 789, aff. 6 W. and S. 114; Walker's Exrs. v. Low's Trs., 1833, 12 S. 44.

⁹² See Law Commissioners, 1838, 3rd Report, page xl.; 1 B.C. 68.

publication to leases of such endurance as to be a source of credit to the lessees.⁹³

The institutional writers are unusually united in holding that an assignation cannot be completed, as in a question with creditors and singular successors, without possession being transferred to and taken by the assignee;⁹⁴ and, though Erskine speaks of some other 'publication by which the conveyance may 'be made known,' the only mode he suggests is adjudication, in which the decree is a public judicial act. The ordinary device for granting security to a creditor was for the debtor to assign the lease and at the same time obtain a sublease of the whole subject, no change taking place in the state of possession. When this device first came before the Court, the competition was with a subsequent adjudication, and it was thought relevant to inquire, whether the surplus rent stipulated to be paid to the assignee had been so paid; whether any part of the rent paid to the landlord was disbursed on the assignee's account; and whether the assignee's name had been entered in the landlord's rental book. There being no evidence to prove the affirmative of any of these questions, the adjudger was preferred. But the general doctrine was laid down that no transmission of a lease can be complete by simple agreement between cedent and assignee, unknown to anybody but themselves.⁹⁵ Possession was, near the end of last and the beginning of the present century, said to be the criterion of preference as between adjudgers and assignees of a lease.⁹⁶ More recently the allowance in the leading case of proof of entry of the assignee's name in the landlord's rental book was the main argument for preferring an assignee never in possession but entered in the rent-roll of a large property, and for repudiating in round terms the necessity of possession.⁹⁷ This view was soon after questioned by a high authority,⁹⁸ and elaborately reconsidered in two cases which unfortunately were decided on specialties. In the first of these there was an *ex facie* absolute assignation to a

Device of sub-lease from assignee to cedent.

Early cases.

Brock v. Cabbell.

⁹³ 20 & 21 Vict. c. 26, *infra*, p. 172.

⁹⁴ St. 3.1.6; Bankt. 2.9.4; Ersk. 2.6.25; 2 Ross' Lect. 506; Hume at p. 811; 1 B.C. 66, 755; B. Pr. 1209-12; More's Notes, 250; 1 Bell, Leases, 451.

⁹⁵ Wallace v. Campbell, 1750, M. 2805, 15282; Elch. Tack, 17; esp. L. Kilkeran's statement, M. 2811.

⁹⁶ *Obiter* in Douglas v. Haig's Tr., 1794, M. 2802, Bell's Fol. Ca. 50 (sublease); Sime's Tr., 1806, M. Appx. Tack, 13;

1 B.C. 67; Grant v. Adamson, 1802, Hume 811 (sublease).

⁹⁷ Yeoman v. Elliot, 2nd Feb. 1813, F.C. 149. There was little possession to be altered, the lease being dated 31st March, the assignation 18th May, and the sublease back 19th July and 17th August, all in 1810, practically one transaction, not therefore raising the point in the text.

⁹⁸ 1 B.C. 67.

bank ; intimation thereof to the landlord ; a sublease by the bank to the cedent ; and no change of possession. A back-bond granted by the bank clearly showed that the transaction was ‘ a collusive ‘ device to create a latent security over a real right without ‘ change of possession ; ’ not a *bond fide* right in the bank to the exclusion of the rights of the general creditors of the cedent (and sublessee), as represented by the trustee on his sequestered estate ; ‘ but the setting up of a fictitious person between the one party ‘ and the other by a collusive transaction.’ And on this ground the assignation was in the end set aside.⁹⁹ The general rule with which this section opened was neither affirmed nor impugned in the House of Lords, and nothing turned upon the facts that the bank’s assignation entered the books of the landlord’s factor, and that the sublease was informal and defective. A case which ran alongside of the foregoing, and was at one time thought to involve the general point, was eventually decided on a specialty wide apart therefrom.¹⁰⁰

Inglis & Co. v.
Paul.

Before these two suits were finally disposed of by the House of Lords, a case was sent to the whole Court, in which a sublessee granted an assignation which was intimated to the lessee before and to the granter’s sublessees after the granter’s sequestration, and no possession was ever had by the assignee. It was held, by a large majority of the Court, that possession was requisite to perfect the assignation in a question with the cedent’s bankruptcy trustee ; that civil possession could easily have been taken by intimation to the cedent’s lessees before the sequestration ; and that after the sequestration it came too late.¹⁰¹ The suggestion was thrown out that the object of perfecting a security by assignation might be attained by the assignee taking an instrument of possession, and then granting a sublease to the cedent ; but this device does nothing to obviate the objection of want of publicity, and has consequently never found favour in practice.¹⁰² Notwithstanding the fact that the later decisions in the House of Lords expressly reserved the general doctrine, nothing has occurred to shake the principle laid down by the majority in this case of *Inglis & Co.*, founded,

⁹⁹ Brock v. Cabbell, 1822, 2 S. 52 (N.E. 46) ; 1 B.C. 67 ; rem. 3 W. and S. 75 ; 1830, 8 S. 647, aff. 5 W. and S. 476.

¹⁰⁰ Russell v. E. Breadalbane, 1822, 2 S. 62 (N.E. 54) ; 1 W. and S. 621 ; 1827, 5 S. 891, aff. 5 W. and S. 256.

¹⁰¹ Inglis & Co. v. Paul, 1829, 7 S. 469 ; see the opinion of the majority,

cited, *supra*, p. 166.

¹⁰² See Roberts v. Wallace, 1842, 5 D. 6 ; Bett v. Murray, 1845, 7 D. 447 ; Ramsay v. Commercial Bank, 1842, 4 D. 405 ; and authorities in the analogous case of moveables in B. Pr. 1300. More’s suggestion (Notes, p. 250) of a mere change of firm seems equally futile.

as it was, on abundant analogy, sound legal principle, and obvious convenience.¹⁰³

Accordingly it has been given effect to in subsequent cases. *Later cases.* Thus an assignation without possession does not carry a lease in a question with the cedent's creditors or bankruptcy trustee, though it be sufficient to transfer a mere petitory claim, such as a claim for recompense for meliorations exigible at the ish of the lease.¹⁰⁴ And where a mining company assigned in security for sums advanced on debentures certain leases, under which it was tenant, to trustees for the debenture holders, and there was no change of possession but only intimation to the landlords, it was held that on the liquidation of the company the debenture holders had no preference over the ordinary creditors. The case was expressly decided on the common law, since the company did not come under the Companies Clauses Acts of 1845, 1863, and 1869.¹⁰⁵ Lord-President Inglis thus states the law:—
 ' Taking this as a question of common law, it does not seem to
 ' me to be attended with any difficulty whatever. The assigna-
 ' tion of the leases, with no possession following upon it, creates
 ' no right whatever in the assignee except a mere personal claim
 ' against the granter of the assignation. It may give him a very
 ' good personal claim to be put in possession of the subjects
 ' assigned, and the granter of the assignation may have no
 ' answer to such a claim when it is made ; but, till possession is
 ' actually obtained, there is no real right and no security created in
 ' favour of the assignee whatever. At one period of the law this
 ' might have been the subject of contention, but for the last half
 ' century it has been settled by the well-known case of Cabbell
 ' v. Brock,¹⁰⁶ and a series of cases connected with it, that an
 ' assignation of a lease without possession is quite unavailing as
 ' a real security.'¹⁰⁷ There is even less difficulty, if besides the
 absence of any transfer of possession the assignation imports
 nothing more than an obligation to give possession at a future
 date, or subject to a condition.¹⁰⁸

¹⁰³ See p. 168, note ⁸⁸.

¹⁰⁴ Hamilton's Tr. v. Stewart, 1830, 8 S. 799 ; see Wright v. Walker, 1839, 1 D. 641 ; referred to *supra*, p. 168 ; see Cannon v. Lindsay, 1869, 6 Sc.L.R. 552 ; Benton v. Craig's Tr., 1864, 2 M. 1365 ; Union Bank v. Mackenzie, 1865, 3 M. 765.

¹⁰⁵ 8 & 9 Vict. c. 17, sects. 40 *seq.* ; 26 & 27 Vict. c. 118, sects. 22 *seq.* ; 32 & 33 Vict. c. 48.

¹⁰⁶ *Supra*, ⁹⁹.

¹⁰⁷ Clark v. West Calder Oil Co., 1882, 9 R. 1017, 1024. The same was held of the moveables included in the trust-conveyance, as to which (*machinery, &c.*, sold *retentâ possessione*), see cases in E. Pr. 1317 ; 1 B.C. 248 *seq.*

¹⁰⁸ Kennedy v. Forsyth, 1829, 7 S. 435.

Fact of change
of possession.

Little assistance in determining the question whether, as matter of fact, there has been a transfer of possession, can be derived from the cases. It may be noted, on the one hand, that a mere application by trustees for debenture holders for authority to sell the subjects embraced in their so-called security, which were subsequently sold by order of the Court, was without difficulty held to infer no change of possession;¹⁰⁹ and, on the other hand, that possession by a tenant's minor son, on propulsiion of the tenancy for the legitimate purpose of prolonging a liferent lease, was proved by his name, as tenant, being substituted for his father's name on the farm-carts, in the landlord's rental-books, and in tax returns, though the father continued to manage the farm.¹¹⁰

2. *The Registration of Leases (Scotland) Act, 1857.*

Statutory
assignation.

What Baron Hume¹¹¹ describes as 'the convenience of business—the practical advantage of accommodating a tenant with the use of his lease as a subject of credit'—gave rise to many suggestions¹¹² aimed at putting long leases on the same footing as other land rights. This could only be done by entering them and documents dealing with them on a register for publication. At length these suggestions were given effect to in the Registration of Leases (Scotland) Act, 1857.¹¹³ This statute is printed in the Appendix without note or comment,¹¹⁴ seeing that it has been subjected to very little judicial criticism. It will be sufficient to give here a short analysis. In supplement thereto, it will be well to remember—(1) the abolition of burgage tenure, except with regard to the records; (2) the mode in which the Act brushes aside a number of the requirements of the Act of 1449;¹¹⁵ and (3) what has been already said as to the mode of completing an heir's title for the purposes of the Act.¹¹⁶

Registers.

The registers prescribed are the General and Burgh Registers of Sasines (sect. 1), the date of entry in the minute-book being

¹⁰⁹ *Clark v. West Calder Oil Co.*, *supra*, 107.

¹¹⁰ *Millar v. Duncan*, 1825, 4 S. 48 (N.E. 59).

¹¹¹ Dec. 812, in note to *Grant v. Adamson*, 1802.

¹¹² See *Wallace v. Campbell*, 1750, M. 2805, 2808, 2812; *Yeoman v. Elliot*, *Brock v. Cabbell*, *supra*,^{97, 99}; 1 B.C. 68; 1 *Hunter* (1st ed.), 410; Law Commissioner's Report, 1838, p. xl, on which a Bill was made and introduced in 1838. An old Act, 1617, c. 4, prescribed a record for long leases by ecclesiastics.

¹¹³ 20 & 21 Vict. c. 26, amended by 40

& 41 Vict. c. 36, but only to the effect of introducing the word 'commissary' after 'sheriff' in sect. 19 of the principal Act.

¹¹⁴ Appx. No. i. The Act has been admirably annotated in Begg's Conveyancing Code, pp. 432 *seq.* The dearth of cases is all the more remarkable since the Act is largely made use of. The Keeper of the Register of Sasines estimates approximately the entries relating to leases at about one-thirteenth of the whole writs recorded, or about 2000 per annum.

¹¹⁵ *Supra*, pp. 123, 127, 132.

¹¹⁶ *Supra*, p. 144.

the date of registration, and extracts being made equivalent to originals, unless these are challenged as forged (sect. 15). The writs registerable are certain sorts of leases and assignments (sect. 3), assignments in security (sect. 4), translations (sect. 6), writs of acknowledgment (sect. 7), adjudications (sect. 10), instruments (sect. 8), discharges, renunciations (sect. 13), and extract decrees of reduction (sect. 14), dealing with recorded leases and their transfers. The leases contemplated are probative leases, dated either before or after 10th August 1857, of lands and heritages in Scotland, for thirty-one years or more (sect. 1), or containing an obligation of renewal so as to endure for that period (sect. 17); provided that, if the subject be not land held burgage before 1st October 1874, leases dated after 10th August 1857 and not executed in implement of an obligation of renewal of older date shall not be registerable unless the name of the lands of which the subjects let consist or form a part is set forth in the lease; and, if the subject be not such burgage, or mines or minerals, unless the extent is also set forth and do not exceed fifty acres (sect. 18).¹¹⁷ Extracts from Records for preservation may be recorded (sect. 19).¹¹⁸

The effect of recording is to make a lease which is binding in a question with the lessor effectual against any singular successor whose infestment is posterior to the recording (sect. 2); to fully vest an assignation (if absolute) in the assignee to the extent assigned (sect. 3); to make an assignation or translation in security a real security over the lease to the extent assigned, enforceable by entry to possession on application to the sheriff (sects. 4, 6); to complete the right of an adjudger (sect. 10) or trustee in a sequestration (sect. 11); and to clear the record of leases on renunciation or of burdens on discharge or of either on reduction (sects. 13, 14). Registration determines all preferences according to its date, not only among recorded writs *inter se* (sect. 12), but also in every respect as if the grantee or party in his right had then entered into possession (sect. 16). Therefore, where neither of two assignees was in possession, the one, whose right was later in date but who registered it under the Act was preferred to the other who had intimated his title to the landlord but had not recorded it.¹¹⁹ It would appear, however, that an assignee in actual possession, under a lease or assignation conforming to the requirements of the Act of 1449, from a date prior to a competing registration has nothing to fear, for there is

Writs registerable.

Effect of registration.

¹¹⁷ As altered by 37 & 38 Vict. c. 94 sect. 25.

¹¹⁸ Amended by 40 & 41 Vict. c. 36.

¹¹⁹ *Rodger v. Crawfords*, 1867, 6 M. 24.

a proviso that 'Except for the purposes of this Act it shall not be necessary to record any such lease as aforesaid, but that leases which would, under the existing law prior to the passing of this Act, have been valid and effectual against' a singular successor 'shall though not recorded be valid and effectual against such singular successors as well as against the granters of the said leases' (sect. 2); and the effect of registration is put no higher than that of possession (sect. 16). If this view be sound the Act has not succeeded—if such were its object—in placing long leases on the same pedestal as feudal rights, in dealing with which it is not necessary to look beyond the records.¹²⁰

Transmissions. Provision is made for a person who was not the original lessee or assignee making up title by notarial instrument (sect. 5);¹²¹ and for heirs making up title for the purposes of the Act in a similar way (sect. 8, 9), or by writ of acknowledgment (sect. 7). The interpretation of the schedules and the procedure for a sale under a bond and disposition in security are imported into the Act from the Heritable Securities Act, 1847.¹²²

B. SUBLEASE.

A lease; constituted and completed as such.

A sublease, being none the less a lease, though granted by a lessee,¹²³ and not by a proprietor, is governed by the same rules as those which regulate the constitution and completion of all leases; in questions between the lessee and sublessee and their representatives and singular successors, requiring the same solemnities or the equitable equivalents;¹²⁴ and being elevated into the position of real rights under the Acts of 1449¹²⁵ and 1857¹²⁶ under the same conditions, to the effect of securing the subtenant against the lessee's assignees, later subtenants, and creditors. The rule is thus stated by Baron Hume in a case which did not properly raise any question of possession,¹²⁷ 'If a

¹²⁰ See Begg, *Conv. Code*, 454; 2 *Journal of Jurispr.* 172, 253, 255.

¹²¹ The reference to *retours* in the schedule must be corrected in accordance with 31 & 32 Vict. c. 101, sect. 27.

¹²² 10 & 11 Vict. c. 50, sects. 2, 3, and sched. (A)—to this effect saved from repeal by 31 & 32 Vict. c. 101, sect. 163.

¹²³ The relation cannot be constituted by the lessor interposing a tenant between his lessee and himself, though he may assign the rents; *Wilson v. Wilson*, 1859, 21 D. 309, 312, *per* L.J.-C. Inglis.

¹²⁴ *Bankt.* 2.9.17; *Ersk.* 2.6.34; 2 *Ross' Lect.* 506; *supra*, chap. iv.

¹²⁵ *Supra*, p. 117.

¹²⁶ *Supra*, p. 172. The Act (20 & 21 Vict. c. 26) does not define 'lease' as including 'sublease,' but no such definition seems necessary, and the Act has been administered in this sense.

¹²⁷ *Grant v. Adamson*, 1802, *Hume* 810 (subtenant who applied for warrant to remove his author preferred to author's trustees whose right was dated the day after citation—on the ground of liti-giousity).

'tenant assigns to John, who intimates to the landlord and then stops short; and, if next the tenant subsets the farm to James (having power to subset) and immediately puts James into possession, this subset burdens the assignee's right, and he must be content to receive the subrents—his author's remaining interest in the farm. The subtenant here is just in the same case with respect to the assignee, wherein the first tenant put into possession would be with respect to a purchaser of the property of the lands; his right is a rider or real burden on the tack established and published by possession, just as the tack is a real burden on the property established and published by the like means. If on the contrary John the assignee enter into possession while as yet nothing has followed on the subset John shall be preferred. He is nowise affected by the subrack to James which is just a tack engrafted on a tack, and unavailable therefore and in its own nature imperfect until followed with possession. It is a species of right which, equally as a principal tack, requires possession to validate it against any third party.' This statement of the law only requires now to be supplemented by the remark that as to certain assignments and subracks registration is equivalent to possession.¹²⁸ Again, if for any of the reasons given in considering the assignability of leases,¹²⁹ a sublease be assignable, the right is completed by possession, not by mere intimation to the lessee.¹³⁰ But a retrocession by a subtenant to his author requires neither possession nor intimation to the landlord to render it effectual against either a trust-deed or bond and assignation in security granted by the subtenant after the retrocession. After retrocession the grantor's possession must be viewed as held *for* the grantee.¹³¹

In common form, a sublease only differs from a principal tack Tenor. in subletting (or subsetting) the subjects; and in so doing under the conditions specified in the principal lease to which special reference is made and of which an extract is delivered, and under obligation to implement the whole stipulations and prestations incumbent on the lessee, with the exception of the payment of the rent due by the lessee to the proprietor which is declared to

¹²⁸ 20 & 21 Vict. c. 26, sects. 12, 16, *supra*, p. 172, *infra*, Appx. No. i.

¹²⁹ *Supra*, p. 157.

¹³⁰ 1 B.C. 67; Ivory's note to Ersk. 2.6.25; obs. in Douglas v. Hay's Tr., 1794, M. 2802 (the judgment seems *contra*, and if so has been overruled,

supra, p. 168, but the case is badly reported—see *per* L. Balgray in Yeoman v. Elliot, 2nd Feb. 1813, F.C. 149, 151).

¹³¹ Underwood v. Richardson, 1824, 3 S. 336 (N.E. 238); Marstons v. Underwood, 1827, 5 S. 200 (N.E. 185).

Subject.	be payable by the lessee out of the subrent. ¹³² As has been already pointed out, ¹³³ either the whole or part of the subject let in the principal lease may be sublet. The duration may be either till the ish of the principal lease or for a shorter period.
Duration.	If nothing be said about the duration, it will probably be presumed—though the point has not been decided—that the two are to run out together. A sublease taken so as to endure till the termination of the principal lease entitles the subtenant to sit till the natural expiry of the principal lease, and, if he is ousted through a reduction thereof, he is entitled to damages; ¹³⁴ but no action will lie, if a pending reduction was in contemplation of the parties, and it was stipulated that in the event of an adverse judgment the sublessee should remove. ¹³⁵
Questions with landlord and his successors.	If the landlord be a party to the sublease, the conditions of his consent should be clearly expressed, <i>e.g.</i> , that the subrent should be paid to the landlord for the time being to the extent of the rent, the tenant remaining, however, bound. ¹³⁶ If the latter be freed from all liability under his lease the transaction is an assignation. ¹³⁷ If the landlord be not a party, the sublessee may be in either of two positions. He may hold right from a lessee whose lease either expressly or by force of the common law excludes subtenants. The landlord may then remove him as possessing without title, or may consent to this subletting. The consent may be given expressly or be gathered from the landlord's conduct inferring homologation or acquiescence. Thus acquiescence was held by a narrow majority (3—2) to be established by inquiries made by the landlord about the character and substance of the subtenant before he entered into possession, by occupation for more than ten years, by payment of rent to the landlord by the subtenant (as appeared from the receipts) on his own account, and by his being allowed to sit after the principal tenant had absconded. ¹³⁸ Open and undisturbed possession for years and factor's receipts for rent acknowledged to have been paid by an occupier <i>quâ</i> subtenant might not, in another case, have been sufficient to prove acquiescence in a sublease for years, but a letter from the factor to him clearly implying a sublease or
Landlord's consent.	

¹³² 1 Jur. Styles (5th ed.), 706, 2 Ross' Lect. 507. As to incorporation of articles of lease, see *Crichton v. Meason*, 1828, 6 S. 403.

¹³³ *Supra*, pp. 156, 157.

¹³⁴ Whether granted before or after the reduction of the lease in a test case, *Middleton v. Yorstoun*, 1826, 5 S. 162

(N.E. 148); *Middleton v. Megget*, 1828, 7 S. 76 ('the length of the Queensberry lease').

¹³⁵ *Laidlaw v. Wilson*, 1830, 8 S. 440.

¹³⁶ 1 Jur. Styles (5th ed.), 708.

¹³⁷ *Supra*, p. 156.

¹³⁸ *Hay v. M'Tier*, 1806, Hume 836 (the judgment seems sound).

at least an agreement for a term of years left no doubt on the matter.¹³⁹ On the other hand, an order sent by the landlord to an occupier 'as my subtenant' to take action in the glen against unlawful peat-cutting was obviously quite consistent with a precarious or yearly tenancy and was no recognition of a sublease for years.¹⁴⁰ Receipt of rent from a subtenant who was also cautioner in the lease was no proof of sanction of the sublease, especially as the acknowledgments were not conceived in his favour.¹⁴¹

If, on the other hand, the lessee is entitled either by express provision or by force of law to sublet, his power to do so is only restricted by the limitations of his lease,—he cannot give out a more comprehensive right than he himself possesses. Within these limits the subtenant's right is valid as against the landlord, in the sense that the latter cannot object to allow him to take possession. Therefore he ought to be called in any action of reduction of the principal lease, at least if the landlord was a party to the sublease¹⁴² or, it is thought, had received intimation of it. But the fact that he was not called therein is no bar to a subsequent reduction of the sublease itself.¹⁴³ And, if he is in possession under a sublease to which the Act of 1449 applies, or has a registered title where the Act of 1857 applies, he is also safe against the landlord and his singular successors, in the sense that he cannot be turned out of possession on the ground of want of title, provided the lessee had power to sublet to him or his right was, as explained in last paragraph, recognised *ex post facto*. Therefore he does not lose his tenure though the lessee deserts his lease or renounces in favour of the landlord.¹⁴⁴ But if the possession may be ascribed to some other right and the sublease has never been intimated, the landlord may lawfully ignore it and get back the subject unburdened by it.¹⁴⁵

Scope of sub-lease.

Protection against eviction.

III.—RIGHTS AND OBLIGATIONS ARISING OUT OF ASSIGNATION AND SUBLEASE.

The immediately foregoing remarks lead naturally to a discussion of the rights and obligations involved in assignation and sublease. Here, again, it will be convenient to separate the two classes of alienations.

¹³⁹ Maule v. Robb, 1807, Hume 835 (subtenants excluded excepting crofters).

¹⁴⁰ Fraser v. Fraser, 1833, 11 S. 565.

¹⁴¹ E. Elgin's Trs. v. Walls, 1833, 11 S. 585.

¹⁴² E. Galloway v. M'Culloch, 1626, M. 7833, St. 2.9.22; Ersk. 2.2.34; 1 Bell, Leases, 470.

¹⁴³ Maxwell v. D. Queensberry's Exrs., *infra*, p. 181.

¹⁴⁴ Obs. in E. Morton v. Tenants, 1625, M. 15228; St., Ersk., Bell, *supra*, ¹⁴²; Bankt. 2.9.17.

¹⁴⁵ E. Morton, *supra*, ¹⁴⁴, *sed quære*. As to the effect of reduction and warrandice, see next chapter.

A. *Out of Assignations.*

Cedent ousted
and free.

It has been already stated¹⁴⁶ that assignation operates a substitution of the assignee for the cedent in the rights and obligations of the lease. The old doctrine was that this substitution involved no liberation of the cedent from his obligations.¹⁴⁷ Early in last century a majority of the Court thought that the difference between an assignation and a sublease was the difference between the transfer of the whole subject let and the transfer of part only, the transferor in both cases remaining liable for the rent.¹⁴⁸ After doubts had been thrown on this doctrine in practice and in text-books,¹⁴⁹ it was finally set aside in a case which determined 'that after an assignation has been regularly executed 'and duly intimated to and acquiesced in by the landlord and the 'assignee admitted to possession, the obligation of the cedent for 'rents is limited to those due prior to the possession of the 'assignee.'¹⁵⁰ There may, however, be a stipulation in the lease, that in the event of his assigning the tenant shall nevertheless remain liable for payment of rent and for implement of all the stipulations in the lease. The result of an assignation so qualified is that the assignee becomes the sole tenant, and the cedent has only a personal right of relief against him on being compelled to pay the rent to the landlord. Therefore where two mineral leases from the same landlord to the same tenant of different subjects in the same coal-field and for different rents and terms of duration contained such a clause and were assigned in the same deed to a company, the cedent was not entitled in a subsequent liquidation of the company to have the liquidator ordained to pay to the landlord the rent due for one of the subjects, the possession of which the liquidator had renounced and which had never been entered on. The reason was that decree would have converted a mere personal right of relief into a preferential claim.¹⁵¹ Or, if the cedent declines to proceed on this footing of continued liability, the landlord will not be taken as recognising the

Unless continuance of liability be stipulated for.

¹⁴⁶ *Supra*, p. 156.

¹⁴⁷ Bankt. 2.9.14; Ersk. 2.6.34; 2 Ross' Lect. 506.

¹⁴⁸ Grant v. L. Braco, 1743, M. 15279 (the minority took the modern view); Bowack v. Croll, 1748, M. 15280 (Kilkeran's Note). Difficulty felt in Low v. Knowles, 1796, M. 13873 (the account of this case in Skene, *infra*,¹⁵⁰ is scarcely accurate).

¹⁴⁹ 1 Jur. Styles (1st ed.) 672; Notes

to Ersk., *supra*,¹⁴⁷; Tait's J.P.' 388.

¹⁵⁰ Skene v. Greenhill, 1825, 4 S. 25 (N.E. 26); and see *per* L. Watson in Elphinstone, *infra*,¹⁵²; 1 Bell, Leases, 468; 1 B.C. 76; Brodie's Stair, p. 371; see also Crawford v. Maxwell, 1758, M. 15307. Not including those due for any part of a broken term—Porter v. Houldsworth, 1829, 7 S. 581.

¹⁵¹ Gray's Trs. v. Benhar Coal Co., 1881, 9 R. 225.

assignment by merely refraining from objecting to the assignees entering on possession.¹⁵² The rules regarding intimation and possession have been already set forth.¹⁵³ The landlord's acquiescence is predetermined where, either expressly or by the common law, assignment is permitted. In other cases it must be proved either by express stipulation or by the landlord's conduct.¹⁵⁴ The same rights and liabilities accrue to and against each assignee as soon as his right emerges, no matter how many transmissions there may have been.¹⁵⁵

Landlord's consent.

An assignee, as coming in room and place of his author, is liable not only for rents due for his own possession and for future rents till he is denuded of his right, but also for all arrears.¹⁵⁶ If a sublease has been granted, the possession of the subtenant ceases, in the event of an assignment of the lessee's right, to be for him and in his right, and it is held as had for the assignee, with the consequent liabilities.¹⁵⁷ The rule applies to trustees—whether voluntary¹⁵⁸ or in sequestrations¹⁵⁹—who adopt the lease.

Assignee liable for arrears.

If the landlord's acquiescence is neither predetermined nor given *ex post facto*, the cedent's liability for rent remains.¹⁶⁰ Where the finding of security for rent is allowed as an alternative to obtaining the landlord's approval of an assignee, the duty lies on the tenant to tender, not on the landlord to demand, security, in order to bring the alternative into play.¹⁶¹ This condition of obtaining the landlord's approval¹⁶² may have an unfortunate effect on a creditor of the tenant. If he obtains an assignment and the landlord consents to it, he is substituted for the cedent and cannot make a retrocession to him without the same consent. He, therefore remains bound by the stipulations of the lease, though his right was all along intended merely as a security and though he may in a question with the cedent bring about a reduction of the assignment.¹⁶³

Cedent's liability.

¹⁵² L. Elphinstone, v. Monkland Co., 1886, 13 R. (H.L.) 98, 11 App. Cas. 332.

¹⁵³ *Supra*, p. 166.

¹⁵⁴ *Supra*, p. 157.

¹⁵⁵ Murray v. Torrie, 1776, 5 B.S. 516.

¹⁵⁶ Turnbull v. Scot, 1628, M. 15273; Bannatine v. Scot, 1632, M. 15274 (back tacks). The case of Drysdale v. Wood, 1832, 10 S. 198, which is *contra*, either is badly decided, or can only be justified on the *ratio* that the lease and its renewal were separate contracts, and that by renewing *simpliciter* the landlord passed from arrears as against the assignee. See also M'Gregor v. Hunter, 1850,

13 D. 90, *per* Ll. Mackenzie and Cunningham.

¹⁵⁷ Paton v. Couston, 1674, M. 15274.

¹⁵⁸ Ross v. Monteith, 1786, M. 15290.

¹⁵⁹ Dundas v. Morison, 1857, 20 D. 225, and other cases, *infra*, chap. xxiv.

¹⁶⁰ Gemmel,¹⁶¹ Ramsay,¹⁶³

¹⁶¹ Gemmel v. Low, 1823, 2 S. 563 (N.E. 486).

¹⁶² See case of representation that cedent thought the approval could easily be got, M'Dougall v. Lobley, 1870, 7 Sc. L.R. 569.

¹⁶³ Ramsay v. Commercial Bank, 1842, 4 D. 405,

B. *Out of Subleases.*

Since three parties at least are interested, questions may emerge in three different ways—

1. *As between Lessor and Lessee.*

Lessor and
lessee.

A sublease has not the effect of discharging the lessee from liability to the lessor, nor the lessor from liability to the lessee, since the original contract continues in full force,¹⁶⁴ and cannot be altered by the operation of the sublease.¹⁶⁵ If the landlord is a party to the contract, and declares the principal tenant free and takes the so-called subtenant bound for payment of the rent due under the lease,¹⁶⁶ the transaction is more properly described as an assignation.

2. *As between Lessee and Sublessee.*

Lessee and
sublessee.

The rights and obligations are those stipulated for in the sublease or arising out of the general law of landlord and tenant, each party having all the remedies which flow from that relation.¹⁶⁷ Thus the tenant's hypothec over the subtenant's goods, when timeously enforced, will, if the tenant be not in arrear to the landlord, be preferred to the landlord's hypothec for rents due for subsequent possession under a lease granted by him to the person who was formerly subtenant.¹⁶⁸ It does not follow, however, that all the rights of the lessee are conveyed to the sublessee. Thus where a sublessee had the option of demanding a renewal, if the tenant obtained a renewal from the landlord, and himself sublet for a fixed period without communicating a similar right, it was held in an action by the sub-sublessee against the principal tenant, that the pursuer had no right to a renewal. It was pointed out that difficulties would have arisen if either tacitly or by express communication the pursuer who held only part of the subjects let could have demanded a renewal, applicable either to the whole or to his part.¹⁶⁹ The subtenant is bound to pay his subrent to the tenant or his assignee unless the payment has been otherwise arranged with the landlord's consent, or the landlord has taken steps to interpell him. Under the absolute warrandice either expressed or implied in the sublease,¹⁷⁰ the subtenant is

¹⁶⁴ Bankt. 2.9.17; Ersk. 2.6.34; 1 B.C. 76; Brodie's Stair, p. 371.

¹⁶⁵ Ronaldson, 18th Dec. 1812, F.C. 49. As to the effect of the warrandice clause, see next chapter.

¹⁶⁶ 1 Jur. Styles (5th ed.), 708.

¹⁶⁷ See Lisk v. Scott, 1682, M. 10608.

¹⁶⁸ Christie v. Macpherson, 14th Dec. 1814, F.C. 95; Stevenson v. Cooper,

1822, 1 S. 312 (N.E. 288); *infra*, chap. xvi.

¹⁶⁹ Robertson v. Player, 1876, 4 R. 218, diss. L. Deas. The participation of the defender in the pursuer's sublease for a different purpose was thrown out of account.

¹⁷⁰ As to which see next chapter.

entitled to claim for damages against the tenant, according to the true import of his right, in the event of eviction, when the landlord's or the lessee's title is reduced.¹⁷¹ No claim lies if there be no eviction—as where the landlord and subtenant have arranged for an equally favourable lease after a reduction of the original lease, and the only grievance of the subtenant has been deprivation of the power of management and of transfer and the uncertainty of his position and consequent anxiety pending the reduction.¹⁷² And any claim otherwise competent may be excluded by a special clause barring it,¹⁷³ or by a clause providing that the subtenant should remove if the lease should be reduced, nothing being said about compensation.¹⁷⁴ Even if the warrantice is from fact and deed only, it gives the subtenant in the event of a reduction of the principal lease 'a vested right to call the 'principal tenant to account for and communicate to the sub-tenant his due proportion of the damages to be recovered by 'him' under his own warrantice—a right arrestable even before actual recovery of damages.¹⁷⁵ Obligations other than those connected with payment of rent are construed as in ordinary cases between landlord and tenant.¹⁷⁶

3. *As between Lessor and Sublessee.*

There being no privity of contract between these parties, no rights or obligations can arise directly between them on the footing of contract. Therefore, though a sublessee has a direct action against the landlord for damages caused through the operations of the latter on the subjects sublet or on adjoining lands,¹⁷⁷ he cannot maintain an action against the landlord or his representatives for damages on account of eviction, in the event of the principal lease being reduced, founding on the warrantice clause contained therein, for whether that lease is expressly granted to the tenant, 'his heirs, assignees, and sub-tenants,' or not, the warrantice can only be available to the tenant and his heirs and assignees, between whom alone and the landlord any contract exists.¹⁷⁸ The subtenant's remedy can only be obtained by a double operation, in which he recovers

Lessor and
sublessee.

¹⁷¹ Middleton v. Yorstoun, 1826, 5 S. 162 (N.E. 148); Middleton v. Meggat, 1828, 7 S. 76; Dick v. Taylor's Trs., 1831, 10 S. 19, *infra*, ¹⁷⁹; see Crichton v. Meason, 1828, 6 S. 403.

¹⁷² Watson's Reps. v. Turner, 1831, 11 S. 687 (claim for expenses in making the new arrangement reserved).

¹⁷³ Hutchison v. D. Queensberry's Exrs.,

1828, 6 S. 849.

¹⁷⁴ Laidlaw v. Wilson, 1830, 8 S. 440.

¹⁷⁵ Smyth v. Rogerson, 1832, 10 S. 433.

¹⁷⁶ *Infra*, chaps. xi., xii., xiii., xvii., xviii.; see Purves v. Gentle, 1797, Hume 794.

¹⁷⁷ Duffy v. Mungle, 1871, 8 Sc. L.R. 537.

¹⁷⁸ Maxwell v. D. Queensberry's Exrs., 1827, 5 S. 935 (N.E. 869), rev. 5 W. and S. 771.

damages for eviction from the tenant under the warrandice implied or expressed in the sublease; and the tenant obtains relief against the lessor or his representatives.¹⁷⁹ In a case where this necessarily circuitous course was adopted, the rights of parties were nowise affected by an agreement in the sublease that in the event of eviction and recovery of damages from the representatives of the lessor, the sum should be apportioned.¹⁸⁰ If the subtenant's claim against the tenant is expressly barred he can have no recourse against the lessor.¹⁸¹

Lessor's
remedies.

If a sublease has been granted, taken, and possessed on without the landlord's consent, predetermined in the lease, presumed at common law, or granted *ex post facto*, the landlord is entitled to remove or eject the sublessee as a possessor without valid title; to sue for violent profits;¹⁸² and to proceed under his hypothec.¹⁸³ If, on the other hand, his consent has been interposed in any of these ways he may eject the subtenant at the termination of the principal lease,¹⁸⁴ and, although he has no personal action against the sublessee—there being no privity of contract between them—he may still enforce his claims against his own—the intermediate—lessee, through the sublessee. Thus, in the matter of rent, he may by arrestment attach the subrents due and to become due by the subtenant to the tenant. He may attach by sequestration under his hypothec—where that remedy is still competent—the stock and crop and *invecta et illata* of the subtenant, so far at least as the subrents have not been *in bonâ fide* paid to the lessee or compensated for in a question with the latter;¹⁸⁵ and to the extent he thus operates payment or holds himself out to be satisfied he relieves the tenant, but no further.¹⁸⁶ In regard both to rent and to other prestations the statutory and conventional irritancies which bring the lessee's right to an end annul along with it the tenure of the sublessee.¹⁸⁷

Rent.

Other presta-
tions.

In regard to these other prestations, it has been already pointed out that in the common form of sublease the subtenant binds himself to implement the whole stipulations incumbent on the lessee, as specified in the principal lease. It has been

¹⁷⁹ *Dick v. Taylor's Trs.*, 1831, 10 S. 19.

¹⁸⁰ *Dick, supra*, ¹⁷⁹.

¹⁸¹ *Hutchison, supra*, ¹⁷³; and see *Watson's Reprs., supra*, ¹⁷².

¹⁸² *Infra*, chap. xxi.

¹⁸³ *Infra*, chap. xvi.; B. Pr. 1237.

¹⁸⁴ *Robb v. Menzies*, 1859, 21 D. 277.

¹⁸⁵ *Hodge v. Brown*, 1664, M. 15274;

Edinburgh Mags. v. Provan's Creds., 1665, M. 6235; *Blane v. Morison*, 1785, M. 6232; *Bankt.* 2.9.17; *Ersk.* 2.6.34; 2 B.C. 32.

¹⁸⁶ *Williamson v. Forbes*, 1830, 8 S. 405.

¹⁸⁷ Though the subtenant be not called, *Grant v. E. Morton*, 1789, 3 Pat. 145.

decided in England, on general grounds equally applicable to the law of Scotland, that such an obligation is not only an obligation *ad factum præstandum*, enforceable by the lessee, but also, in the event of a breach by the sublessee, a contract of indemnity rendering the latter liable in damages and in expenses properly incurred in an action brought by the landlord against the lessee to enforce the covenants of the principal lease; but that no direct action lies at the instance of the landlord against the sublessee.¹⁸⁸ The proper course in Scotland would be to raise separate actions, one at the instance of the landlord against the tenant, the other at the instance of the tenant against the subtenant, and to have them conjoined, so as to mulct the subtenant in the expenses of the conjoined suit, if that be the justice of the case.¹⁸⁹ It results *à fortiori* that, if there be no express adoption by the subtenant of the covenants of the principal lease, there can be no question between landlord and sublessee; the only difficulty being whether adoption can be implied in a question between lessee and sublessee.¹⁹⁰ If the transaction be not so much a sublease as a joint lease granted to the original tenant and to his so-called sublessee, a direct action will be competent.¹⁹¹ Over and above the aforesaid circuitous remedy by way of obtaining performance or indemnification, there is the direct preventive remedy of interdict, competent to the landlord, when he sees a negative provision of the principal lease or of the common law on the point of being broken by the sublessee.

¹⁸⁸ *Hornby v. Cardwell*, 1881, 8 Q.B.D. 329.

¹⁸⁹ In England the same end is attained by bringing in the subtenant as a third party to the landlord's suit; *Hornby, supra*,¹⁸⁸. These views, which seem to follow from *Maxwell, supra*,¹⁷⁸, and *Hornby, supra*,¹⁸⁸, supersede the first

two of Baron Hume's suggestions in reporting *Purves v. Gentle*, Dec. p. 794; and see B. Pr. 1252.

¹⁹⁰ Hume, 3rd and 4th suggestions in *Purves, supra*,¹⁸⁹.

¹⁹¹ *Gibson v. Moffat*, 1824, 2 S. 766 (N.E. 638), to put premises in repair.

CHAPTER X.

TENANT'S RIGHT AND OBLIGATION TO POSSESS.

THE primary right of a tenant is to be put and to be maintained in possession of the subject let, and the primary obligation of the landlord is so to put and maintain him. The converse is equally true, but of less practical importance. The tenant is bound to take and retain possession, and the landlord has the correlative right to compel him to do so or to pay damages. In each case the rule applies to the whole premises let, including their appurtenances.

It will be convenient to examine the subject, according to the following division:—(A) In regard to the primary right, to discuss (1) the rule that the whole premises let shall be given over, and the remedies in case of breach; and (2) the right to be maintained, and the obligation to maintain, in possession during the whole course of the lease, and the remedies in case of breach, wherein the effect of warrandice will be explained: and then (B) to proceed (1) to the tenant's obligation to take possession and the consequences of breach thereof; and (2) to his obligation not to invert possession, and the consequences of inversion. It will be convenient to bring together elsewhere the rules of law relating to term-days and terms, including terms of entry.¹

A. TENANT'S RIGHT TO POSSESSION.

By ousting
possessors.

Conditional
right.

This right involves a communication to the tenant by the landlord of his right to remove or eject possessors according to the forms of law, or a title to call on the landlord to proceed for that end at his own expense.² A condition precedent to obtaining possession will not be strictly read. Thus a stipulation that

¹ *Infra*, chap. xv.

² St. 1.15.6; Bankt. 2.9.21; Ersk. 2.6.28; see the very special case of *Winans v. Mackenzie*, 1883, 10 R. 941,

where the demand for ejection was held not applicable to cottars, at least in absence.

a tenant should pay one year's rent in advance was held to be sufficiently implemented by tender of payment on the 23rd of November, the date of entry being Martinmas.³ An agreement Inhibition. to grant and take a lease, being equivalent to a lease, entitles the lessee to inhibit the landlord, so as to prevent sale of the subjects to the lessee's prejudice; and the landlord is not entitled to recal of the inhibition merely on consignment of a sum of damages demanded alternatively in an action by the lessee for implement of the agreement and possession. For, if he were held so entitled, the question would be virtually settled that the tenant was not entitled to specific performance if the landlord preferred to pay damages.⁴ The possession must be given Timeous. timeously. Therefore, where access to a house let was demanded by the tenant ten days after the term of entry, but was not offered to be given till after an interval of twenty days more, and the tenant was obliged to take another house, he was held to be free of the bargain, notwithstanding an averment that by local custom there was frequently much delay in entry.⁵ And delay in giving possession for thirty-five days after the term on account of injury to a workshop through accidental fire, which took place before the term, was held to free the tenant.⁶

I. RIGHT TO BE PUT IN POSSESSION OF THE WHOLE SUBJECT LET.

1. *Apart from Reservations.*

Questions seldom arise as to the amount or extent of the subject let when it consists of houses or small holdings, as to which there can be scarcely any doubt about boundaries or area.⁷ Yet one case may be cited as probably deciding that the right to the whole of a subject must be enforced reasonably, and not according to the strict letter; for it was held to be no objection to the lease of a country house, that the landlord, without notice, reserved possession of a charter-room, store-room, observatory, and spare furniture room.⁸ And another case may be referred to where the question was whether the great gearing of a steam-engine was or was not included under a lease.⁹ Many cases Cases in which questions arise. have, however, arisen when larger premises have been let for agricultural, pastoral, or sporting purposes; and the questions turn, in practice, not so much on the effect of delimitation by As to rural subjects.

³ *Smith v. Robertson*, 1831, 9 S. 751.

⁴ *Seaforth's Trs. v. Macaulay*, 1844, 7 D. 180 (*L. Moncreiff's ratio* was sufficient for a decision).

⁵ *Brown v. Maxwell*, 1633, M. 3109.

⁶ *Drummond v. Hunter*, 1869, 7 M. 347.

⁷ As to boundaries generally, and common and gable walls in particular, see the authorities collected in Rankine on *Landownership*, chaps. vi., xxii., xxxiii.

⁸ *Webster v. Lyell*, 1860, 22 D. 1423.

⁹ *Walker v. Turnbull*, 1843, 5 D. 1334.

physical meiths and bounds, as on the effect of (a) a general description; (b) of measurements; and (c) of a reference to former possession.

(a) *Effect of a General Description.*

To let in
proof.

Of what was
lettable or let.

Custom of
trade.

State of
possession.

A general description [‘the lands (salmon-fishings, &c.) of A’] is such as to require explanation; and proof will be allowed of the extent of what was lettable and actually let, and each party must take the risk of the result.¹⁰ Thus an offer to take a farm named at so much an acre, ‘for all not let of said farm,’ was accepted by the landlord in general terms. At the time a neighbouring farmer on the same estate possessed under his lease a few acres of the farm. The offerer, after failing to get his neighbour removed from these acres, brought a reduction of his lease on the ground that he had not obtained possession of all the land let to him; but his claim was repelled on the ground that he was entitled to no more than was truly out of lease at the date of the agreement.¹¹ The custom of a trade may, however, be called in to show that a general description of a trade subject let means something different from its *prima facie* sense. The owner of a glass-work, in letting it, undertook if required to erect a ‘cutting-shop.’ This expression was proved to mean, in the language of that trade, a cutting-shop, and an engine-house and chimney stalk as well; and the Court refused to interfere with a verdict giving effect to this interpretation.¹² If the dispute be between two tenants on the same estate, the question may turn on proof of possession; and, if so, the tenant holding the earlier lease will succeed if he can show that he possessed the disputed subjects before his neighbour came into possession, for it was out of the power of the landlord, without agreement, to benefit the new-comer at the expense of the sitting tenant.¹³

(b) *Effect of Measurements.*

Weights and
Measures Act,
1878.

By the Act 41 & 42 Vict. c. 49, which repeals a great number of earlier statutes and consolidates the law of weights and measures, local and customary measures are made unlawful, and contracts made in the United Kingdom by measure are to be deemed to be made according to the imperial measures ascertained by the Act, or some multiple or part thereof (sect. 19), or according

¹⁰ See case of cottage as pertinent of country-house—*Lowson v. Ross*, 1881, 18 Sc.L.R. 315.

¹¹ *Fraser v. Mathieson*, 1824, 2 S. 734 (N.E. 613).

¹² *Watson v. Kidston*, 1839, 1 D. 1254; see *Dickson on Evid.* 199; and in

England, 1 *Smith's L.C.* 617 *seq.*; *Clayton v. Gregson*, 5 A. and E. 302 (‘level’ in mineral lease); *Smith v. Wilson*, 3 B. and Ad. 728 (1000 rabbits).

¹³ *Andersons v. M'Callum*, 1857, 20 D. 2.

to the metric system (sect. 20). The unit of imperial measures is the duly ascertained imperial yard, from which all other measures of extension, whether lineal, superficial, or solid, are ascertained (sect. 10). The acre, rood, and pole contain respectively 4840, 1210, and $30\frac{1}{4}$ square yards (sect. 12).¹⁴ A lease granted or taken in terms of any other measures than these, or aliquot parts of them, would be void. And, if these terms are actually used, it will be irrelevant to offer proof that a Scots or other customary measure was really intended by the parties or either of them.¹⁵

Usually the acreage of a farm is stated,¹⁶ in the advertisements and lease, alongside of a reference to the possession of the outgoing tenant. If no such reference can be made, on account of the land having been in the owner's hands, or being a part only of a farm or an aggregate of sundry parcels of land detached from several farms and thrown together into one possession, it has been suggested that 'if the tack specify the entire number of acres 'or the extent of the several parcels of land it is at least more 'presumable that the parties have settled the rent on this 'medium' [that is, on the footing of so much acreage], than if a known farm were let, 'as possessed by' the late tenant.¹⁷ There can be little doubt of the law as so stated, but it may be questioned whether the inference drawn would follow,—viz., that deduction would be allowed for short measure. It may be assumed, on the contrary, that, in the absence of fraud, there would be no remedy for a miscalculation of extent, unless it could be shown that the rent though a slump sum was actually to the knowledge of the landlord calculated as at so much per acre.¹⁸ Thus, where a subject was let as 'these five acres of newly trenched ground on the 'south side of' a wood, and the ground actually possessed consisted of 6 ac. 1 rood, 16 poles, the measurement was regarded as demonstrative not taxative, and the landlord was not entitled to resume any part of the ground for planting without paying the compensation agreed on in the lease.¹⁹ Even a calculation of

Mistake in extent.

Demonstrative and taxative.

¹⁴ The corresponding Scots superficial measures were—5760 ells = 160 falls = 4 roods = 1 Scots acre = 1·261183 English acre. So that 23 Scots acres = 29 English acres, very nearly, or, for practical purposes, 4 Scots acres = 5 English acres.

¹⁵ See *Thomsons v. Garioch*, 1841, 3 D. 625; B. Pr. 36, 91.

¹⁶ See a case where the acreage was not stated but the obligations of the tenant could only be implemented on a farm larger than the farm actually let, the

consequence being abatement of rent for the past and reduction of the lease for the future; *Riddell v. Grosset*, 1791, 3 Pat. 203.

¹⁷ *Hume* in reporting *Yeaman v. Gilruth*, 1792, Dec. 783.

¹⁸ This seems to have been the fact in *Yeaman*.¹⁷ See the cognate cases of *feus*, *Hepburn v. Campbell*, 1781, M. 14168; *Harley v. Campbell*, 1822, 1 S. 238 (N.E. 226).

¹⁹ *Menmuir v. Airth*, 1863, 1 M. 929.

rent depending on acreage may be binding though its basis be faulty. Thus land extending to 60 acres was let as 'containing 48 'measured acres, every acre to pay six firlots.' The tenant was held not to be bound either to remove from 12 of the acres or to pay for 60 acres according to the scale—the bargain being in reality a lease of the farm at a rent of 288 firlots.²⁰ The words 'or thereby' appended to a measurement are intended to provide for minute errors and fractional deficiencies.²¹ It has never been decided—the question is eminently a jury one—what minimum proportional deficiency would be material and fatal, if timeously complained of.²²

(c) *Effect of Reference to former Possession.*

Where prior possession is referred to in describing the subject let, it will as a rule override description by measurement; in other words, the measurement will be regarded as demonstrative, not taxative.²³ Thus where the subject let was described as 'fourteen acres presently possessed' by the lessee, an offer of proof that the lessee had been for thirty years, both before and after the tack was taken, in possession of more than fourteen acres was held relevant to infer right to possess the whole.²⁴ A sheep farm was advertised as of a certain extent, but was let without mention of its extent 'as at present possessed 'by' the outgoing tenant. In the last year of the lease it was ascertained that the acreage was less by nearly a fourth than the advertised amount. There was no fraud; ²⁵ substantial error only was insisted on. It was held that the advertisement could not be looked to as forming part of the contract; but, apart from that, it was also held that the discrepancy was no ground for reduction, sheep farms being taken in view of the stock carried, not of the acreage let; and that the tenants who had never complained during the lease and could not make *restitutio in integrum* were not entitled to damages, since an *actio quanti minoris*²⁶ cannot be maintained.²⁷ The same result of controlling measurement has been obtained by letting land 'as it shall be

Measurement
and prior
possession.

Measurement
and actual
delivery.

²⁰ *Rothead v. Borthwick*, 1679, M. 2264.

²¹ *Yeaman, supra*, 17.

²² See *Balmer v. Hogarth, infra*, ²⁷ (7 acres out of 333 *not*).

²³ *Ibid*.

²⁴ *Deas v. Kyle*, 1667, M. 10604.

²⁵ As to fraud see *supra*, p. 85.

²⁶ As to which see St. 1.9.10; 1.10.14; *Ersk.* 3.3.10; *Bankt.* 1.19.3; *B. Pr.* 99, 893; *Reddie v. Syme*, 1831, 9 S. 413, *aff.* 6 W. and S. 188; *M'Kirdy*

v. Anstruther, 1839, 1 D. 855; *Amaan v. Handyside*, 1865, 3 M. 526; *Dobbie v. Duncanson*, 1872, 10 M. 810; *Brownlie v. Miller*, 1878, 5 R. 1076, *aff.* 7 R.H.L. 66; *Houldsworth v. City of Glasgow Bank*, 1879, 6 R. 1164, *aff.* 7 R.H.L. 53.

²⁷ *Oliver v. Suttie*, 1840, 2 D. 514. This decision is not shaken by *Balmer v. Hogarth*, 1830, 8 S. 715, 10 S. Appx. 862, 4 Sc. Jur. 390, where the only valuable part of *L. Brougham's* judgment relates to the issues.

'delivered over at entry,' especially if the acreage be not warranted. A tenant was thus excluded from claiming possession of an enclosure which adjoined the subjects he had actually got entry to, and was required to make up the gross measurement of the farm and also the measurement of the adjacent field.²⁸ But a reference to possession ('all as lately occupied by D') was not allowed to control a contradictory description in the leading part of the letting clause, so as to force a lessee of the 'exclusive' right of shooting over the lands of G'—a grouse moor—to put up with finding that two of the seven beats were held in common with another party, though such had been the prior state of possession. The rent having been paid in advance, damages were held to be due to the tenant in lieu of abatement of rent. For the rule against the admissibility of an *actio quanti minoris* did not apply to a case in which it was no part of the duty of the tenant to renounce possession immediately on discovering the defect.²⁹

Thus far we have dealt only with deficiencies in the extent of the corporeal subjects let. The right granted out in a lease may not, however, be confined merely to the possession of a corporeal subject: it may and usually does include a communication of such incorporeal rights and privileges as are necessary or proper for the enjoyment of the premises within the scope of the uses or purposes for which the lease is granted. In so far as these rights and privileges are exercised over the property of third parties (servitudes, natural rights of property with the corresponding nuisances, commonry, church-room, &c.), they will be more conveniently discussed in a later chapter dealing with the rights of a lessee over-against third parties unconnected with him in title.³⁰ In so far as these incorporeal rights and privileges (such as accessions, lights, water-privileges, &c.) are exercised over the lessor's own land, it has never been established that as between landlord and tenant, who are jointly interested in the same subject and have entered into a contract *bonæ fidei*, there is any stronger case in favour of the existence of such privileges *extra fines* than in questions between adjacent proprietors who are merely bound by the rules of good neighbourhood or by the law of the tenement.³¹ The contrary seems to be the case. The privilege must, therefore, be either an absolute necessity of occupation; or it must be expressly granted, or plainly implied. Thus there was no implication of a grant of right of access by a particular

Incorporeal
rights appur-
tenant.

²⁸ *Hardie v. Kinloch*, 1842, 5 D. 64.

³⁰ *Infra*, chap. xxv.

²⁹ *Critchley v. Campbell*, 1884, 11 R. 475.

³¹ See *Laurent v. L. Adv.*, 1869, 7 M. 607; *Miller v. Renton*, 1885, 13 R. 309.

private road—belonging to the landlord but not a road of necessity—where the whole evidence was that the person employed to point out the boundaries of the farm to offerers merely pointed out the road as the way to the principal town in the district and mentioned that it had been used as such by the outgoing tenant. It appeared that this use was in virtue of a verbal licence from the landlord's factor, objected to by the landlord but not withdrawn. An opinion was, moreover, expressed that right to continue the use of the road under the new lease would not have been communicated by employing therein the words 'as possessed by' the outgoing tenant. As put by Lord Chancellor Cairns: 'That which was possessed by him was the farm and merely the farm. He may have had or he may not have had a collateral licence, a licence while he was tenant of the farm to use the road in question; but that was no part of the possession of the farm, nor was it appurtenant to the possession of the farm.'³² It may be gathered, however, that if so appurtenant, the general words quoted would have had the same inclusive force as the phrase of English law, 'with all ways usually possessed and enjoyed.'³³ So that in a subsequent case the Court did right in sanctioning a continuance by a tenant of his possession of a road along but outside of his march on a farm situated on the same estate, since both he and his neighbour held their farms 'as presently occupied by' the outgoing tenants, and there had been sufficient possession for a possessory judgment.³⁴ In such cases the right is not properly speaking a servitude—a right only available as between owners;³⁵ and the duration of an unusually long lease does not affect this principle.³⁶ The landlord is entitled to intervene in cases which affect his interests.³⁷ Conversely, land burdened by such a privilege, if let as possessed by a former tenant passes into the new tenant's hands subject to the burden, the existence of which he is presumed to have ascertained.³⁸ But such a clause will not avail to keep up a right or burden inconsistent with, or plainly outwith, the purpose for which the subjects were let.³⁹

Warranty of fitness.

It will be convenient to postpone the law relating to warranty

³² *Duncan v. Scott*, 1876, 3 R. (H.L.) 69, 75 (the point did not require to be decided).

³³ 3 R. (H.L.) 76.

³⁴ *Galloway v. Cowden*, 1885, 12 R. 578; following *M'Donald v. Dempster*, 1871, 10 M. 94.

³⁵ *Ibid.*

³⁶ See *M'Donald*, *supra*, ³⁴.

³⁷ *Young v. Cunningham*, 1830, 8 S. 959.

³⁸ *Gordon v. Ruxton*, 1797, Hume 798 (servitude).

³⁹ *M. Queensberry v. Haining*, 1812, Hume 859 (agricultural tenant casting peats for sale).

of fitness for the purpose for which a subject is let to subsequent chapters which deal with repair and meliorations.⁴⁰

The remedies in case of gross discrepancy between the subject let and the premises delivered over, are action of reduction of the lease and of damages, brought at a time when *restitutio in integrum* is still possible,⁴¹ or instead of damages a deduction from the rent for the period of past possession;⁴² or the withholding of the rent till the deficiency is removed;⁴³ or suit for damages when the rent has been paid forehand,⁴⁴ or no possession has been given,⁴⁵ or the damage exceeds any rent which could be withheld.⁴⁶

Remedies.

2. *Reservations in favour of the Landlord.*

In leases of subjects other than land the nature of the right granted out suggests the natural limitations of a possession which is inherently of a limited character. Thus a lease of fishings does not oust the proprietor from such uses of the water as do not interfere with the fishing. A lease of minerals gives no more than the necessary or a prescribed use of the surface; and special reservation is frequently made, in letting one seam, of all other seams not involved in the working of the mineral let. A lease of woods gives no power to interfere with the surface, except in so far as necessary for the profitable exercise of the right, or with minerals. A lease of a house implies reservation to the owner of right of access to perform the necessary repairs incumbent on him, and gives no title to minerals.

In specifically limited sub-jects.

The reservations which are of most importance are those which occur, either *ex lege* or by special stipulation, in the letting of land for agriculture or pasture.

In farming leases.

(a) *Ex lege.*

From the limited nature of the right granted out in such leases, it follows that 'it is not understood to comprise every right which was before competent to the landlord, but is limited to those yearly fruits, which, either naturally or by the lessees' industry spring up from the surface.'⁴⁷

Ex lege.

⁴⁰ *Infra*, chaps. xi, xii.

⁴¹ *Oliver v. Suttie, supra*, 37.

⁴² *Riddell v. Grosset*, 1791, 3 Pat. 203 (not enough arable land); *Yeaman v. Gilruth, supra*, 17.

⁴³ See *Kilmarnock Gas Co. v. Smith*, 1872, 11 M. 58; *Guthrie v. Shearer*, 1873, 1 R. 181; *Gray v. Renton*, 1840, 3 D. 203; cf. *Humphrey v. Mackay*,

1883, 10 R. 647, *infra*, chap. xiv.

⁴⁴ *Critchley v. Campbell, supra*, 29.

⁴⁵ *Matheson v. Nicolson*, 1819, 2 Mur. 141; *Smith v. Robertson*, 1832, 10 S. 829 (items of damage).

⁴⁶ See *Goskirk v. Edinburgh Ry. Access Co.*, 1863, 2 M. 383.

⁴⁷ *Ersk.* 2.6.22.

(1) *Minerals.*

Minerals.

Therefore the minerals are reserved, with the right to search for and work them, and the necessary access and accommodations, subject to payment of surface damages.⁴⁸ The landlord or any one in his right is entitled to break ground during the currency of the lease.⁴⁹ He has the exclusive right to shell marl, since it differs in kind from clay marl as much as limestone does from the ordinary soil.⁵⁰ The question whether a tenant can remove soil from one part of his farm to another without permission has never been determined, but the determination would probably depend on the result of a remit to a man of skill appointed to report on the probable results. The landlord is entitled to use existing roads (as well as to open new ones) subject to the obligation of sharing the expense, equitably apportioned, of necessary repairs.⁵¹ The landlord is liable only for such damage as is caused by operations which take place with his sanction, or as properly thence arises, not for damage or annoyance caused by the trespasses of his miners.⁵² Surface damages, properly so called, do not extend to injury caused by subsidence, but only to such injury as affects the ordinary agricultural use of the subjects,⁵² such as damage to crops by use of the surface or by smoke coming from workings or mineral-heaps;⁵³ but this rule would not prevent the tenant from claiming repair of injury caused by sits to the farm-house and other farm buildings.⁵⁴ In some of the cases above referred to there was special stipulation. The effect of such stipulations in extending or restricting or not altering the tenant's right is in each case a matter of construction. In case of breach of a reservation, the landlord's remedy is by action of damages and interdict, not by forfeiture of the lease.

Remedies.

(2) *Woods.*

Woods.

Woods with the necessary accesses and accommodations are reserved *ex lege*.⁵⁵ If let, as accessory to a farm, the tenant can

⁴⁸ St. 2.9.31; Bankt. 2.9.21; Ersk. *ut supra*, 47; 1 Bell, Leases, 202; B. Pr. 1226; More's Notes, 225; Colquhoun v. Watson, 1668, M. 15253 (pipe-clay).

⁴⁹ Smith v. M'Gill, 1768, M. 15266, Hailes 223.

⁵⁰ Bethune v. Jervise, 1778, M. 15267, (question as to clay-marl left open).

⁵¹ This rule may be collected with some difficulty from Wight v. Wight's Trs., 1828, 6 S. 1116.

⁵² Galbraith's Trs. v. Eglinton Iron Co., 1868, 7 M. 167, 172. Therefore the lease should be drawn so as not to exclude

damages for dislocation of drains through subsidence.

⁵³ See cases between landlord and mineral tenant, and between surface and mineral owners—Oswald v. Gordon, 1853, 16 D. 70; Neill's Trs. v. Dixon, 1880, 7 R. 741; Allaway v. Wagstaff, 4 H. and N. 681, and other cases collected in Rankine on Landownership, p. 410.

⁵⁴ See Hamilton v. Turner, 1867, 5 M. 1086, 1098.

⁵⁵ Balf. 208; Cr. 2.10.3; Bankt. 2.9.21; Ersk. 1.6.22; B. Pr. 1226; More's Notes, 255; Hutchison's J.P. 508; Tait's J.P. 258.

only cut for repairing or erecting the necessary farm buildings, not for alienation.⁵⁶ Though woods be not expressly let, the tenant may nevertheless cut willows when of the nature of withs, but not when grown into measurable timber.⁵⁷ The old remedy for breach was forfeiture of the lease,⁵⁸ but this is no longer the law. At a period when the encouragement of planting and enclosing was the constant care of the legislature of a land which had never been fenced and had lost nearly all its primeval timber, penalties of £10 Scots and £20 Scots were imposed on the destroyer or injurer of trees below and above ten years old respectively (1685, c. 39);⁵⁹ and tenants and cottars were made liable not only for their own acts, but for those of their wives, children, servants, and others within their family (1698, c. 16). The burden of indemnifying the owners of woods for the destruction or injury of trees was thrown on the 'parish, town, hamlet, 'vill, or place,' as in cases of riot; and the burners of woods were to be treated as wilful fire-raisers (1 Geo. I. st. 2, c. 48).⁶⁰ There is no indication in the books that this British Act has ever been put into operation, though it doubtless remains as part of the law of riots. The Scots Acts have been administered in comparatively recent times.⁶¹ It may be assumed, however, that the law of malicious mischief and the Trespass Act of 1865 are strong and wide enough to dispense with the necessity of resorting to the old statutes.⁶²

(3) *Kelp-shores.*

An agricultural tenant is excluded *ex lege* from cutting ware for the manufacture of kelp, and an offer of proof by a tenant holding his farm with pertinents used and wont, that he and his predecessor had been in use to make kelp, was held irrelevant.⁶³

(4) *Right to take Game and Wild Animals.*

This reservation will be discussed in a later chapter.⁶⁴

⁵⁶ *L. Touch v. Ferguson*, 1664, M. 423, 12552.

⁵⁷ *Bogue v. Wight*, 1806, M. Planting and Enclosing, Appx. 2. Willows do not fall under the enumeration in 6 Geo. III. c. 48; 9 Geo. III. c. 41; 13 Geo. III. c. 33.

⁵⁸ *Balf. : Craig, supra*, ⁵⁵.

⁵⁹ See earlier Acts, 1661, c. 41; 1669, c. 17.

⁶⁰ 1716, amended 6 Geo. I. c. 16. The later British Acts—6 Geo. III. cc. 36, 48; 9 Geo. III. c. 41; 13 Geo. III. c. 33—are all repealed.

⁶¹ 1805, *Cooper v. Campbell*, M. Plant. and Enclos., Appx. 1. The cases (which need not be further noticed) are contained in M. 10478-9, 10484, 10492, 10497, and Appx. Nos. 1 and 2, and are reviewed in 2 Hunter, 198.

⁶² See *M'Kay v. Patrick*, 1882, 10 R. (Just.) 10; 28 & 29 Vict. c. 56 (camping and lighting fires).

⁶³ *Campbell v. Campbell*, 1795, M. 9646. (Kelp-ware, like timber, takes more than a year to grow into fitness for use).

⁶⁴ *Infra*, chap. xviii.

(β) *Conventional Reservations.*

Special powers
of resumption.

These are capable of endless variation, but as a rule they are either expressions, exact or modified, of the foregoing implied reservations, or powers to resume land for any or certain purposes.⁶⁵ Thus, though power to resume is implied in a reservation of minerals,⁶⁶ it is usual to bind a farming tenant expressly to allow ground to be taken for the necessary works and roads, when required. If, on the other hand, power to resume for a purpose not connected with the mines, woods, or game is to be set up, it must be expressly reserved⁶⁷ or plainly implied by the actings of the tenant.⁶⁸ In either case a diminution of the size and value of the subjects is the consequence; and compensation (usually by way of deduction of rent) must be given, whether stipulated for or not, provided the contrary is not agreed on.⁶⁹ Arrangements made for these purposes and followed by possession are good against singular successors.⁷⁰ The ordinary purposes for which right of resumption is reserved are planting,⁷¹ feuing, and excambing.⁷² The question of the extent to which resumption shall be admissible in any case depends on a fair construction of the clause of reservation, after taking into consideration the circumstances in which it was entered into. Thus, a power reserved by a burgh to feu some acres for the improvement of its rent, did not entitle it to resume forty out of ninety acres;⁷³ while a right to feu 'the whole or any parts or portion' of an arable farm near a small town was held to be a plainly worded power to recall every yard of the land, without reference either to the feuing customs of the estate or to the terms on which the feu or feus were granted—for a lump sum or for an adequate feu-duty.⁷⁴ It would appear, too, that the tenant cannot interfere with the discretion of the landlord in selecting the land to be resumed otherwise than by appealing to the law of nuisance.⁷⁵

Compensation. For the ascertainment of the compensation which is due on

⁶⁵ As to breaks and general powers of resumption, see *infra*, chap. xx.

⁶⁶ 1 Bell, Leases, 205, seems in error on this point.

⁶⁷ See case of resumption for purposes not within the purview of the power—*Caledonian Ry. v. Smith*, 1877, 14 Sc. L.R. 510.

⁶⁸ *Belshes v. Fraser*, 1839, 1 D. 1071.

⁶⁹ *Menmuir v. Airth*, 1863, 1 M. 929.

⁷⁰ *Moon v. Roger*, 1828, 6 S. 1118 (compensation for road in the shape of

possession of the old road).

⁷¹ *Menmuir v. Airth*, *supra*, ⁷⁰; *Grant v. E. Seafeld*, 1867, 4 Sc.L.R. 496 (special bargain for common benefit).

⁷² As to notice to treat under the Lands Clauses Acts, see *Glasgow Union Ry. v. McEwen & Co.*, 1870, 7 Sc.L.R. 426.

⁷³ *Pew v. Mercer*, 1737, Elch. Presumption, 10.

⁷⁴ *Stewart v. Lead*, 1825, 1 W. and S. 68.

⁷⁵ *Hunter* (ii. 204) suggests a greater power of interference.

account of this diminution in the size of the farm and in its value to the tenant, it is usual to agree to a reference to arbiters or valuers.⁷⁶ The form of compensation is, as a rule, a reduction of rent. It may be proved, however, by express renunciation of claim, or by facts and circumstances plainly implying renunciation, that the tenant has passed from his right; as, where a tenant got a neighbouring farm from the same proprietor, and resided for fifteen years and to the end of the lease in a house there, the improvements on which, he verbally admitted, had fully indemnified him for the loss of the buildings resumed by the landlord on the other farm.⁷⁷ It is thought that the same result should have followed in an earlier case where it was held, on the contrary, that the tenant's claim was good. Pieces of land were resumed twelve, seven, and four years respectively before the ish of the lease. After the ish there was a further possession for two years on fresh missives; during the whole period the full rent was paid; and it was only when, three years after the tenant had removed from the diminished farm, the landlord proceeded to sequester the tenant for rent due for a different farm, that a claim for indemnification was sent in and this was the first intimation of a claim.⁷⁸ The value of the lands to the tenant should be taken as at the date of resumption, not at the date of the lease.⁷⁹ The result of this where the value of the land has risen, or of resumption at a large fixed sum per acre agreed on in the lease may be that the compensation money exceeds the rent. If in such circumstances the landlord becomes bankrupt, the tenant has no preference for the surplus.⁸⁰

II. THE TENANT'S RIGHT TO BE MAINTAINED IN POSSESSION.

—The general rule is that, possession once taken, the landlord shall do nothing, and, so far as in him lies, allow nothing to be done to oust the tenant from the subject let or any material part of it during the lease.⁸¹ And the leading, though not the only, remedy is action on the warrandice expressed or implied in the

⁷⁶ See as to validity of award, *Patrick v. M'Call*, 1867, 4 Sc.L.R. 12.

⁷⁷ *Belshes v. Fraser*, 1839, 1 D. 1071.

⁷⁸ *Hallyburton v. Blair*, 1837, 15 S. 750.

⁷⁹ *Sharpe v. Burt*, 1788, M. 15262. (The rule is general though here helped by the use of 'equivalent' not 'pro-

portional').

⁸⁰ *Bertram v. Guild*, 1880, 7 R. 1122.

⁸¹ See *Paterson v. Blair*, 1819, 2 Mur. 177; *Dalziel v. D. Queensberry's Exrs.*, 1826, 4 Mur. 10, 18; *Murray v. Douglas*, 1837, 15 S. 890; *Wauchope v. Stephens* 1826, 4 S. 766 (N.E. 774).

lease.⁸² It will be convenient to state, in the first place, the general rules applicable to the obligation of warrandice, and thereafter to detail the circumstances in which the obligation comes into play in questions between landlord and tenant.

Warrandice.

The warrandice usually expressed, and, if not, always implied unless otherwise stipulated, is absolute.⁸³ But it only applies to the subjects which are really let, and a mixed question of fact and law may arise as to the extent of the premises to which the warrandice was intended to reach. Thus, where a portion of lands let was at the date of the lease in adverse possession, and remained so for twenty years without objection taken by the lessees, who (and one of them especially who was the landlord's factor) were cognisant of the dispute about the title, the Court refused recourse to the warrandice, which was regarded as inapplicable to this portion of the farm.⁸⁴ Again, the warrandice does not extend to a part of the subjects possessed by a tenant, not as included in the lease, but as a matter of favour;⁸⁵ or to a loss which both parties, knowing the limits of the granter's right, took the risk of.⁸⁶ The landlord does not require to disclose every or any burden, which the tenant might and ought to discover for himself.⁸⁷ An obligation of warrandice did not avail to indemnify a tenant for loss caused by a servitude enjoyed by third parties on the lands let at the date of the lease, since the subjects were therein described as possessed by the outgoing tenants, and the incoming tenant must be presumed to have made inquiry.⁸⁸

Of incorporeal subjects.

Doubt may be expressed of the soundness of a later case in which an incorporeal right might, it is thought, have been fairly regarded as part of the subject let. The proprietor of part of a loch let his share to mill-owners who had a lease of the rest. They erected an embankment and sluice for the collection and regulation of the outflow into a stream on which their mills were situated. The proprietor

⁸² Balf. 319; Ersk. 2.6.25.39; 2 Ross' Lect. 493; 1 B.C. 644; B. Pr. 141, 894, 1208, 1253; 1 Bell, Conv. 200.

⁸³ *Middletons v. Yorston*, 1826, 5 S. 162 (N.E. 148); *Middletons v. Meggat*, 1828, 7 S. 76. The case of *Carmichael v. Peter*, 1765, M. 16630, did not turn on warrandice but on assignation to certain profits which failed.

⁸⁴ *Kinloch v. Fraser*, 1829, 7 S. 819. [The landlord was held bound to give the tenants (it was a long lease) the use of his

name for vindication of the ownership, reserving questions of expenses.]

⁸⁵ *Burnet v. Stewart*, 1863, 1 M. 524.

⁸⁶ *Reid v. Shaw*, 1822, 1 S. 334 (N.E. 311).

⁸⁷ *Symington v. Cranston*, 1780, M. 16637; *Hailes*, 844.

⁸⁸ *Gordon v. Ruxton*, 1797; *Hume*, 798. (There was some evidence of notice, but the decision did not turn on that.) See *Fraser v. E. & G. Union Canal Co.*, 1830, 9 S. 46.

afterwards let for bleaching purposes riparian lands on this stream, and the bleaching tenant enjoyed the use of the water thus regulated. At the close of this lease, the proprietor relet the bleach-field 'as possessed by' the former tenant. When the lease of the loch ran out, he removed the lessee and demolished the sluice. The bleaching tenant demanded a restoration of the former state of things, or, in default, damages. But the Court held that, as the privilege was not expressly warranted, there was no recourse. It is suggested that the demolition of the sluice was a breach of contract, and that at the worst the tenant was entitled to have it stand and to access for repair.⁸⁹

The law of warrantice seems to have been dangerously strained *Do.* in a later case, in which, moreover, the foregoing decisions do not seem to have been cited. A bleach-work was let, 'with full 'power over and control of the existing water-power.' The water-power was, prior to the date of the lease and during its course, regulated by means of reservoirs up-stream, and a customary water-rent was paid for the maintenance of these, at first by the landlord; then, as arranged, by the tenants; and, lastly, for five years by the tenant without arrangement. The Court, by a majority, held the tenants entitled to deduct the water-rents for these five years from the rent due to the landlord, the ground of judgment being the warrantice in the lease, as applicable to the privilege of water-power, which formed part of the consideration for which rent was paid. It was held to make no difference that there had been no eviction; that there could have been none, since the other manufacturers must have kept up the reservoirs in their own interest; and that there was probably no legal obligation to contribute to the water-rent *inter socios*.⁹⁰

Warrantice only comes into play when eviction has taken place, or is certain to come where the ground of demand proceeds from the fault of the lessor, or is threatened where liability is disputed;⁹¹ or is only avoided by the expiry of the lease leaving behind a liability for violent profits.⁹² When the claim for eviction is made, the grantee ought to give notice. If he do so, he is not

In case only of
eviction.

⁸⁹ *M'Donald, Young & Co. v. Hamilton*, 1831, 9 S. 402. Contrast *Dunlop & Co. v. Steel Co. of Scotland*, 1879, 7 R. 283.

⁹⁰ *Sawers v. M'Connell*, 1874, 1 R. 392. (The majority was 2 to 1, and the judgment was a reversal.)

⁹¹ *Balf.* 319; *Ersk.* 2.3.30; 2 *Ross'* Lect. 493; 1 B.C. 645. See *Smith v. Ross*, 1672, M. 16596; *Menzies v. D.*

Queensberry's Exrs., 1832, 11 S. 18. (The eviction, *ex facie* of the putative, was really of the true, tenant.)

⁹² *Hyslop v. D. Queensberry's Exrs.*, 1822, 2 S. 8, aff. 2 S. Ap. 63; *Bell v. D. Queensberry's Exrs.*, 1824, 3 S. 416 (N.E. 292); *Kelloch v. Eosd.*, 1824, 3 S. 418 (N.E. 294). See as to latent defects and fraud, *Wood, Nuisance*, 955.

bound judicially to defend the right.⁹³ If he do not give notice, he takes the risk of the omission of any relevant defence.⁹⁴ There is no indemnification for eviction resulting from the tenant's own carelessness or fault.⁹⁵

A claim to indemnification.

The claim is for complete indemnification for loss, past, present, and to come. If the eviction be total, the whole worth of the lease to the tenant at the date of eviction is taken.⁹⁶ If partial, the usual mode of compensating the tenant is to make a deduction from the rent.⁹⁷

Title to sue.

The claim lies at the instance of the lessee, his heirs and assignees,⁹⁸ not, as has been already shown,⁹⁹ of subtenants. It is conceived in terms binding the lessor, his heirs and successors, and is enforceable against the lessor, his representatives, and his successors, whether by singular or universal title, in the subjects let.¹⁰⁰ Personal representatives are liable ultimately only if the lands fall to one who does not derive his right through the lessor. Thus, heirs of entail are only liable if they represent the lessor,¹⁰¹ or if the lease is within the lessor's powers.¹⁰² If it is a contravention of the entail, and is consequently reduced, the lessee's only recourse is against the representatives of the lessor.¹⁰³ The lessor himself is liable though no possession has been taken by the lessee, where forfeiture of the lessor's right as heir of entail has intervened in the interval between the date of the lease and the stipulated term of entry.¹⁰⁴ This subject has been further illustrated by cases already noted which have arisen between lessee and sublessee.¹⁰⁵

Supervenient law.

There is no recourse against the lessor or his successors where the loss is brought about by the action of a supervenient law,¹⁰⁶

Illegal acts.

as by a statutory change in the close time for salmon fishing;¹⁰⁷ or

⁹³ *Downie v. Campbell*, 31st Mar. 1815, F.C. 182.

⁹⁴ 1 B.C. 645.

⁹⁵ *Stewart v. Wand*, 1838, 16 S. 408 (encroachment on pasture).

⁹⁶ See *Cairns v. Howden*, 1870, 9 M. 284, and authorities there cited.

⁹⁷ *Infra*, p. 200.

⁹⁸ *Maxwell v. D. Queensberry's Exrs.*, 1827, 5 S. 935, rev. 5 W. and S. 771, 783 per L. Chan. Lyndhurst.

⁹⁹ *Supra*, p. 181.

¹⁰⁰ See the cases as to privity of contract and estate, collected in *Stewart v. McCallum*, 1868, 6 M. 382, aff. 8 M. (H.L.) 1; and *Swintoun v. L. Craigmillar*, 1650, 1 B.S. 469.

¹⁰¹ *Oliphant v. Scott*, 1830, 8 S. 985 (entail defective in regard to leases and contracting debt).

¹⁰² *Supra*, p. 49.

¹⁰³ *Downie v. Campbell*, ⁹³: *Hyslop v. Bell v. Kellock v. Menzies*, *supra*, p. 197; *Symington v. D. Queensberry's Exrs.*, 1823, 2 S. 162, aff. 2 S. Ap. 80.

¹⁰⁴ *Downie*, ⁹³.

¹⁰⁵ *Supra*, p. 181.

¹⁰⁶ See the cases on this matter in relation to public burdens collected in *Rankine on Landownership*, 717.

¹⁰⁷ *Holliday v. Scott*, 1830, 8 S. 831; and see *Crawford v. Kennedy*, 1694, M. 7866, 10125, 4 B.S. 342; *McKenzie v. Kennedy*, 1697, M. 7867; *L. Boyle v.*

if loss results from an illegal act of a third person, which both lessor and lessee are entitled to put a stop to, and to which the lessor is no party—as where a tenant complains of damage to his water-power through the operations up-stream of a feu from the landlord, the feu expressly prohibiting anything which might prejudice the tenant, and there being no sufficient allegation that the landlord had departed from this condition;¹⁰⁸ or if the injury results from a legal act of a third party (a neighbour, for example) which both landlord and tenant must be understood to have taken the risk of;¹⁰⁹ or if there be *lucrum cessans* through the prohibition of the tenant's trade as a nuisance, unless there was a special warranty that the premises were fitted for the prosecution of such a trade.¹¹⁰ The claim does not prescribe till forty years after the date of the distress, which, as already explained, may be different from actual eviction.¹¹¹

Common risk.

Nuisance.

Prescription.

Eviction may be either partial or total.

(A) *Partial Eviction.*

The remedy in case of partial or temporary eviction is an action of damages, which usually takes the form of a demand for reduction of rent, when the eviction is of a permanent kind. But in circumstances which involve practically a suspension or dissolution of the relation of landlord and tenant there is the more thorough-going remedy of throwing up or reducing the lease.

Partial eviction.

(1) *Damages, and Abatement of Rent.*

(a) *Damages for Partial and Temporary Eviction.*

Damages are due by the landlord, if, by executing on the subject let operations which he is not entitled to execute, he ousts the tenant from possession,¹¹² or causes injury to the tenant's property; or if, having agreed to erect a sufficient embankment to protect a farm from inundation, he neglects to do so, and injury results;¹¹³ or if, having reserved right to lay out water-courses he exercises his right negligently, and by his negligence causes flooding.¹¹⁴ The remedy extends to reimbursement of the expense fairly

Damages for partial temporary eviction.

Pollock, 1700, 4 B.S. 481; Goldie v. Williamson, 1796, Hume 793, all relating to tolls and customs, as to which the better opinion was that the lessee took the risk; Heriot's Hosp. v. Angus, 1709, M. 10126 (multures). Contrast case of loss of a hotel licence—an ordinary risk—Donald v. Leitch, 1886, 13 R. 790.

¹⁰⁸ Gardner v. Walker, 1862, 24 D. 1430; and see as to pollution of stream Reid v. Shaw, 1822, 1 S. 334 (N.E. 311).

¹⁰⁹ Piers v. Black, 1680, M. 16605; Reid v. Shaw, ¹⁰⁸.

¹¹⁰ Murray v. Buchanan, 1776, M. 16636.

¹¹¹ 1617, c. 12; Mack. Obs. *in loc.*; Ersk. 3.7.36, is *contra*.

¹¹² Bisset v. Whitson, 1842, 5 D. 5 (unroofing dwelling-house).

¹¹³ Scott v. Tait, 1826, 4 Mur. 57.

¹¹⁴ Menmuir v. Airth, 1863, 1 M. 929. (This case and the last arose on special covenants.)

incurred in preserving the property, and to indemnification for the loss and inconvenience entailed by the result of these operations or of this neglect.¹¹⁵ It seems to be established, in consistency with *dicta* in the case of *Menmuir*, that, if the operations take place not on the subject let but on adjacent premises belonging to the same owner, the latter is not bound to show more respect to his own tenant's interests than to those of a neighbouring owner or his tenant, and is only liable in damages if he (or his contractor) shows 'negligence, recklessness, unskilfulness, or want of due care' and attention to the rights and interests' of his own tenant. In the case which gave rise to these observations the pursuer was a restaurant keeper and the claim was laid on loss of custom through dust and noise and on injury to the appearance of the premises, all caused by building operations next door.¹¹⁶ The same rule would apply if landlord and tenant occupy different floors in the same house.¹¹⁷ The rule of liability common to cases between landlord and tenant and cases between adjoining owners is that reasonable care must be taken in conducting such operations, so as to do as little damage as possible to the neighbour; and that the latter is not entitled to complain of every little inconvenience to which he is put.¹¹⁸ There seems to be no valid distinction between injury to the fabric, fixtures, and moveables, and injury to the tenant's trade,¹¹⁹ but injury such as lets in the landlord's obligation to repair is on a different footing.¹²⁰ Again, a lessee of steam-power is entitled to damages for loss caused by extraordinary stoppages and is not barred by a clause providing for making up stoppages either by deduction of rent or extra work, since that clause only applies to stoppages of ordinary occurrence.¹²¹ Right to damages, otherwise competent, may be lost, if a claim be not timeously made.¹²²

(b) *Abatement of Rent on account of Partial and Permanent Eviction.*

Through act of
the landlord.

Abatement is ordered if a partial eviction takes place through

¹¹⁵ *Robertson v. Menzies*, 1828, 6 S. 452 (raising roof of gig-house and stable).

¹¹⁶ *Laurent v. Lord Adv.*, 1869, 7 M. 607. The rule of liability seems to be sound; but L. Deas' criticism of the last part of the cited direction to the jury (that it was too vague) is entitled to much weight; cf. *Hamilton*, 1667, M. 10121; *Deans v. Abercrombie*, 1681, M. 10122, which were really cases of damages; *Marshall v. Cohen*, 9 Amer. Rep. 170 (water-closet in upper story)

and cases in *Wood*, Nuisance, 140.

¹¹⁷ *Per L. Kinloch*, 7 M. 714.

¹¹⁸ *Cameron v. Fraser*, 1881, 9 R. 26, 29.

¹¹⁹ *L. Kinloch supra*, ¹¹⁷, *contra*.

¹²⁰ *Laurent, supra*, ¹¹⁶, such repair was made without demur.

¹²¹ *Wilson v. Norris*, 10th March 1810, F.C. 624. See *Kilmarnock Gaslight Co. v. Smith*, 1872, 11 M. 58.

¹²² *Clugston v. Goold*, 1823, 2 S. 308 (N.E. 271).

an act of the landlord himself, of which the tenant did not originally take the risk, and which is contrary to the *bona fides* of the contract; as where a landlord having let a farm and an inn at a lump rent, and his successor in the lands set up a rival inn on a new road in the neighbourhood, though the tenant had to take the risk of the new road being made, the landlord was not entitled to attract custom away from her by his own act, and she might have obtained interdict if she had timeously applied.¹²³ Abatement was allowed, where the lessor of fishings detracted from their value by erecting a dock.¹²⁴ Apart from the action of the Lands Clauses Acts, a tenant has been held entitled to deduction of rent effeiring to land—such as a road—taken from his farm for public purposes without his consent.¹²⁵ And practically the same result is obtained by the rule that the remedy of sequestration for rent will be refused or a charge for rent suspended, where an essential part of the subject let is withdrawn by the landlord,¹²⁶ directly or indirectly,¹²⁷ provided that the tenant can point to a distinct averment of the withdrawal instantly verifiable.¹²⁸

But if the tenant takes the risk of the landlord's acts and their Exceptions. consequences he is not entitled either to abatement of rent or to damages. Thus where mills were advertised with no other representation than that there was an abundant and regular supply of water, and let without any stipulation as to the water, the tenant was held not to be entitled to complain of irregularity of supply occasioned by the act of a miller up-stream, to whom the same landlord had let under the sole condition that he should keep his sluices open for three hours a-day at least—which was just the state of possession when the complainer took possession.¹²⁹ For the same reason the tenant of a thirlage mill is not entitled to relief though the lessor lays down in grass part of the lands within the sucken which were formerly cropped.¹³⁰ And where the contract is shown to be a lease, not of lands but of rents, as by its covering a number of let tenements and by its having an anticipated entry, the lessee cannot withhold rent on the plea

¹²³ *Campbell v. Watt*, 1795, Hume 788; see *Smith v. Cameron*, 1879, 6 R. 1107; *Craig v. Miller*, 1887, Sc.W.N. 53.

¹²⁴ *Hall v. Ross*, 1813, 1 Dow 201.

¹²⁵ *Brown v. Brown*, 1826, 4 S. 489 (N.E. 494).

¹²⁶ *Kilmarnock Gaslight Co. v. Smith*, 1872, 11 M. 58; *Guthrie v. Shearer*, 1873, 1 R. 181, *infra*, chap. xvi.

¹²⁷ *Gordon v. Suttie*, 1826, 4 Mur. 86;

and next case.

¹²⁸ *Humphrey v. Mackay*, 1883, 10 R. 647.

¹²⁹ *Aitchison v. Glasgow Mags.*, 1825, 1 W. and S. 153 (recourse against upper miller reserved).

¹³⁰ *Slowan v. Hawthorn*, 1756, M. 16052; *Chalmers v. Wilson*, 1769, M. 16060.

that he has not obtained possession of the lands.¹³¹ The tenant will be barred from claiming deduction if he has given a promise in writing to pay the full rent;¹³² or, if an ample surrogate be furnished for the part of his holding of which he has been deprived;¹³³ or, if he allows the lease to run out without complaint.¹³⁴

Through act of third party. If the loss is caused by the acts of third parties, in which the landlord has no hand, there is in the absence of special stipulation no claim for abatement of rent¹³⁵ or for damages, whether these acts be lawful or unlawful; for in the former case landlord and tenant share a common risk to the extent of their respective interests;¹³⁶ and in the latter case they are equally entitled to put a stop to the nuisance.¹³⁷

Damnum fatale. Where partial, yet permanent, eviction or deprivation results *ex damno fatali*, by pure accident or public calamity,¹³⁸ it seems to be settled that the tenant is entitled to cause the landlord to share the loss through an abatement of rent,¹³⁹ unless the loss be trifling,¹⁴⁰ or unless the claim has been passed from.¹⁴¹

Lands Clauses Acts. The case of compulsory sale, surrender or expropriation of lands under lease is provided for by the Lands Clauses (Scotland) Act, 1845,¹⁴² sects. 112-115. A lessee for a term of years unexpired is entitled to claim and be compensated in the same way as any other person interested in the land (sects. 6, 17) for damage done to him in his tenancy by reason of the severance of

¹³¹ *Maxwell v. Montgomery*, 1681, M. 15173.

¹³² *Butter v. Loch*, 1830, 8 S. 408.

¹³³ *Burns v. Stewart*, 1830, 8 S. 641, aff. 5 W. and S. 356.

¹³⁴ *Parlane v. Hamilton*, 1828, 6 S. 977 (turnpike rate table not supplied to toll-keeper).

¹³⁵ *Donald v. Leitch*, 1886, 13 R. 790 (hotel reduced to public-house licence).

¹³⁶ See *Dunsmore v. Oswald*, 1821, 1 S. 170 (N.E. 161).

¹³⁷ *Infra*, chap. xxv. In *Houstoun v. Harvey*, 1831, 9 S. 560, there was a final decree for damages obtained in the Sheriff Court, as to one term.

¹³⁸ See cases of war and rebellion, *Wilkie v. Ker*, 1662, M. 10120; *Customs Tacksman v. Greenhead*, 1667, M. 10121; *Edinburgh Bailies v. E. Lothian Heritors*, 1663, M. 10120 (exemption from rates); *Strachan v. Christie*, 1751, M. 10129

(no relief for forced levy by rebels from tenant of landlord's cess); *Sinclair v. Hutchison*, 1751, M. 10130; *Bankt.* 1.20.18.

¹³⁹ St. 1.15.3; *Ersk.* 2.6.41; B. Pr. 1208; *E. Eglinton v. Tenants*, 1742, M. 10128, *Elch. Tack*, 8; *White v. Moncreiff*, 1849, 11 D. 1031; *Walker v. Bayne*, 30th May 1811, F.C. 265, rev. 3 Dow, 233, 241, *per* L. Redesdale; and see *D. Hamilton's Trs. v. Fleming*, 1870, 9 M. 329. The plea is one, not of compensation but, of rent not due, *Muir v. M'Innes*, 4th Feb. 1887.

¹⁴⁰ *Piers v. Black*, 1680, M. 16605; *Steedman v. Kennedy*, 1744, *Elch. Tack*, No. 7 (access); *Sharpe's Factor v. L. Monbodo*, 1778, M. 10134 (well giving out).

¹⁴¹ *Kinnaird v. Matthewson*, 1802, 4 Pat. 429. See as to *damnum fatale* more at length, *infra*, p. 204.

¹⁴² 8 & 9 Vict. c. 19.

the lands required from those not required by the promoters,¹⁴³ or otherwise by reason of the execution of the works (sect. 113). If part only of his holding be required, the rent is apportioned either by agreement between the landlord, the tenant, and the promoters, or by the sheriff,¹⁴⁴ and the lessee remains liable to the landlord for the portion allocated to him, all remedies, conditions, and agreements except as to amount of rent being left intact (sect. 112). There may be a binding agreement between the lessee and the promoters without the concurrence of the lessor.¹⁴⁵ Failing apportionment the lessee is liable for the whole rent.¹⁴⁶ Neither party has a right of lien on the other's compensation money.¹⁴⁷ Where the lease is held for a year only, or from year to year (sect. 114), or is within a year of its expiry,¹⁴⁸ or is not produced within twenty-one days after demand made for it by the promoters (sect. 115), compensation to the tenant for the value of the unexpired term or interest and for any allowance that ought to be made to him by an incoming tenant, or for any loss he may sustain, or, if part only of the lands be taken, for damage by severance or otherwise injuriously affecting the same¹⁴⁹ is assessed by the sheriff, if possession be demanded before expiry of the lease.¹⁵⁰ The tenant is thus entitled to full compensation, and continues liable for the whole rent.¹⁵¹ If he is allowed to remain after the date fixed for removal, he can have compensation (unless it be arranged otherwise), for the precariousness of his tenure as compared with his former security,¹⁵² but not for damage done in the prosecution of the promoters' works.¹⁵³ Notice to treat given to the landlord bars him from thereafter entering into a lease which shall affect the promoters.¹⁵⁴

Lease for a year.

Notice to treat.

¹⁴³ *Hunter v. N.B. Ry.*, 1849, 12 D. 37.

¹⁴⁴ Not by an arbiter, *Re Ware*, 9 Exch. 395.

¹⁴⁵ *Slipper v. Tottenham, &c., Ry.*, L.R. 4 Eq. 112.

¹⁴⁶ *Wainwright v. Ramsden*, 5 M. and W. 602. See a case in which this was the arrangement, *N.B. Ry. v. Renton*, 1864, 2 M. 442.

¹⁴⁷ *Carey*, 10 L.T. 27; *Nadin*, 17 L.J.Ch. 421; *Peddie v. Brown*, 1857, 3 Macq. 65.

¹⁴⁸ *Tyson v. London Corp.*, L.R. 7 C.P. 18; *Reg. v. G.N. Ry.*, 2 Q.B.D. 151, followed by the parties in *Ferguson v. Hood*, 1881, 9 R. 168.

¹⁴⁹ See case of pollution of water, *Caledonian Ry. v. Barr*, 1855, 17 D. 312.

¹⁵⁰ Not mere notice to treat before that date, *R. v. Stone*, L.R. 1 Q.B. 529; see *Glasgow Union Ry. v. M'Ewen*, 1878, 8 M. 747.

¹⁵¹ *Wainwright*, ¹⁴⁶: *Ferguson*, *supra*, ¹⁴⁸.

¹⁵² *Cranwell v. London Corp.*, L.R. 5 Exch. 284; *R. v. London, &c., Ry.*, 10 A. and E. 3.

¹⁵³ *R. v. Vaughan*, L.R. 4 Q.B. 190.

¹⁵⁴ *N.B. Ry. v. Lindsay*, 1875, 3 R. 168. (Question there, whether possession is requisite to entitle a tenant to compensation.)

(B) *Total Eviction.*(1) *Reduction of the Lease by a Third Party.*

This is the typical case of total eviction and is mainly illustrated by the decisions relating to the Queensberry Leases,¹⁵⁵ which were reduced as in contravention of entails after prolonged litigation. It has already been pointed out that where there never has been a completed lease but possession has been taken on an incomplete contract, the loss falls where it lights, there being no claim of damage on either side.¹⁵⁶

(2) *Right to Abandon.*

(a) *In cases where the Landlord is wholly responsible for the Loss.*

These cases will fall to be examined in later chapters which deal with repairs and meliorations.¹⁵⁷

(b) *In cases of damnum fatale and other Accidents.*

Damnum fatale.

It is easier to describe than to define what is known as *damnum fatale*, act of God, *vis major*, or inevitable accident. It has been said to be a 'miracle of nature';¹⁵⁸ an occurrence 'unprecedented and such as could not have been reasonably anticipated';¹⁵⁹ and as a circumstance 'which no human foresight can provide against and of which human prudence is not bound to recognise the possibility.'¹⁶⁰ It will be well to adhere to this use of the phrase. But in the present connection, accidents of another description have the same effect in questions between landlord and tenant as these unprecedented occurrences. Thus, human prudence is bound to recognise and does recognise every day the possibility of accidental fires. Now the rules which are contained in the immediately following paragraphs apply both to *damna fatalia*, and to what are popularly known as accidents, provided that in the latter case neither landlord nor tenant nor any one in their employment acting in strict accordance with or within the scope of their orders or authority was at fault.¹⁶¹ If fault exist for which either party is responsible, he

Accident.

Negligence.

¹⁵⁵ Hyslop : Menzies : Bell : Kelloch : Symington : Maxwell : also Hutchison : Dick v. Taylor's Trs. : Middletons v. Yorston & Meggat, *supra*, pp. 181, 196-8. Downie v. Campbell alone is not of the series.

¹⁵⁶ *Supra*, p. 115.

¹⁵⁷ Chaps. xi, xii. See esp. Kippen v. Oppenheim, 1847, 10 D. 242; Scottish Heritable Sec. Co. v. Granger, 1881, 8 R. 459; Lowndes v. Buchanan, 1854, 17 D. 63; Thomson v. Paxton, 11 D. 1113.

¹⁵⁸ *Per* L. Cockburn in Samuel v. E. and G. Ry., 1850, 13 D. 312, 314.

¹⁵⁹ Potter v. Hamilton, &c., Ry., 1864, 3 M. 83, 87.

¹⁶⁰ *Per* L.-Ch. Westbury in Tennant v. E. Glasgow, 1864, 2 M. (H.L.) 22, 27, affg. 1 M. 133. See illustrations cited in Rankine, Landownership, 314.

¹⁶¹ As to which see Linwoods v. Hathorn, 14th May 1817, F.C. 327, aff. 1 S. Ap. 20, and Mackintosh v. Mackintosh, 1864, 2 M. 1357, overruling Keith v. Keir, 10th

must bear the burden of repairing the loss caused by the so-called accident and can have no recourse against the other.¹⁶² Thus, where the only credible explanation of the cause of the burning down of a house was that the tenant had set fire to a heap of rubbish hard by and allowed it to burn for several days down to the date of the conflagration, he was held to be in fault and liable to the landlord in damages.¹⁶³ Where apparatus was erected in an improper manner and without the usual precautions against the spread of fire and the premises were consumed in consequence, the tenant who was in fault was mulcted in damages, though the landlord knew that such apparatus was being used, since it would have been innocuous if properly erected and worked.¹⁶⁴ It was sufficient negligence in the lessee of a malt kiln to leave it at night without a watch in the full knowledge that the fire-place was in the neighbourhood of lath and plaster.¹⁶⁵

The common-law rules regarding the loss sustained by *damna fatalia* and by accidents as thus understood are that (1) neither party is bound to restore the subject to its former or to an equivalent state, and (2) that the tenant is entitled to abandon the lease or demand abatement of rent according as the *rei interitus* is actually or constructively total or only partial.

(a) *Neither Party liable to Restore.*

This doctrine, which was latent in a number of earlier decisions outside of the law of landlord and tenant,¹⁶⁶ was established by a judgment of the House of Lords in 1815,¹⁶⁷ which determined that a subject destroyed through inevitable accident (as by a fire) '*perit suo domino*,' and that the meaning of the maxim is, not that the proprietor is alone to suffer but, that all who are interested constitute the *dominus* and that the subject perishes to all concerned according to their several interests. The rule

June 1812, F.C. 679; and see the English cases, *Williams v. Jones*, 33 L.J. Exch. 297; *McKenzie v. McLeod*, 10 Bing. 385. Contractors—*Rankin v. Dixon & Co.*, 1847, 9 D. 1048; *Cleghorn v. Taylor*, 1856, 18 D. 664; *Cameron v. Fraser*, 1881, 9 R. 26; and *L. Watson in Angus v. Dalton*, 6 App. Cas. 831.

¹⁶² As to fire, 1426, c. 75; Mack. Obs. *in loc.*; Balf. 509; Bankt. 1.10.42; Ersk. 2.6.43 and notes. The statutory prohibition of action against persons on whose estate or in whose buildings fire occurs relates to purely accidental fires, and agreements between landlord and tenant

are saved—14 Geo. III. c. 78, sect. 86.

¹⁶³ *Sutherland v. Robertson*, 1737, M. 13979, Elch. Reparation, 2 (the other defender seems to have been a co-tenant).

¹⁶⁴ *Hardie v. Black*, 1768, M. 10133.

¹⁶⁵ *Macellan v. Kerr*, 1797, M. 10134. See *Walker v. Bayne*, *infra*,¹⁶⁷ where the question of fact was whether live coal leapt of itself to an adjoining straw bed, or was carried on the back of a cat.

¹⁶⁶ See cases in *L. Redesdale's* opinion, 3 Dow 241-3.

¹⁶⁷ *Walker v. Bayne*, 30th May 1811, F.C. 265, rev. 1815, 3 Dow 233, 6 Pat. 217.

applies whether, as in the case cited, the landlord did not desire to rebuild and the tenant was under no special obligation to repair, or, as in a case¹⁶⁸ which was in effect overruled by the judgment of the House of Lords, both parties were desirous to restore and the tenant was bound to uphold the premises in tenantable and habitable condition and leave them so at their removal. Such an obligation is not intended to provide for purely accidental loss.¹⁶⁹ The landlord is not relieved of any counter obligation by the tenant's inability through *damnum fatale* to perform his part.¹⁷⁰

(β) *Right to Abandonment or Abatement.*

Abandonment
or abatement.

The question whether a tenant is on the one hand entitled to abandon his lease or to claim abatement of rent, or on the other hand bound to remain in his holding and pay the full rent is (otherwise stated) a question as to the incidence of risk in a common enterprise. The principle is laid down by Lord Stair¹⁷¹ in a passage which was thus paraphrased in a recent decision of high authority.¹⁷² 'There is a peril or risk undertaken by the tenant; he is at the risk of the quantity and the value of the subject, but he is not at the risk of the being or existence of it.' Therefore, if a subject let be totally destroyed by causes beyond the control and not within the contemplation of the parties, the contract comes to an end; if there be destruction of part only of the subject let there will arise a claim for abatement of rent.¹⁷³ There is considerable difficulty, however, in carrying this undoubted principle into practice. The cases which are usually employed in illustration are—as to agricultural subjects, sterility, storm, inundation, and fire; as to fisheries, a change of stream;¹⁷⁴ as to minerals, exhaustion of strata; as to buildings, fire, the fall of a neighbouring house, war, rebellion,¹⁷⁵ and riot.

Measure of
loss.

It may be safely said to follow from the principle above stated that the Court will not be confined in adjusting the rights of parties by any artificial rule (such as has been frequently

¹⁶⁸ *Swinton v. M'Dougals*, 16th Jan. 1810, F.C. 487.

¹⁶⁹ *Duff v. Fleming*, 1870, 8 M. 769.

¹⁷⁰ *D. Hamilton's Trs. v. Fleming*, 1870, 9 M. 329.

¹⁷¹ St. 1.15.2 (the passage is too long for quotation).

¹⁷² *Per L. Chan. Selborne in Gowans v. Christie*, 1873, 11 M. (H.L.) 1, 4, affg. 9 M. 485.

¹⁷³ 15, §§ 2-5, 25, § 6, D. (19.2); Glück's Commentar. xvii. 447; Weiske's Rechts-lexicon, vii. 776; Vangerow, § 641; St. *ut supra*,¹⁷¹ Mack. 3.3.5; Bankt. 1.20.13, 2.9.24; Ersk. 2.6.41; Kames' Equity, 243; Pothier, Louage, p. 109; Code Nap. 1722. *Contra* in England, Woodfall (15th ed.), 408.

¹⁷⁴ *Foster v. Adamson*, 1762, M. 10131.

¹⁷⁵ Cases, *supra*, p. 202.

suggested) that in order to justify abandonment or abatement the loss must be either total or at least '*plus quam tolerabile*,' *Plus quam tolerabile?* the latter phrase being explained (with special reference to agricultural subjects) as meaning such a calamity that in consequence of it the produce of the crop does not exceed the expense of the seed and tillage;¹⁷⁶ or (with reference to mineral leases) that the subject becomes unworkable to profit even if no rent were payable.¹⁷⁷ Lord Stair's view that in a lease for years there are as many locations as years, and that therefore the question of abatement must be considered separately for each year, if it ever was law, cannot be held to be so in modern times, when a tenant for years takes the good with the bad and expects his profit from his tenure taken as a whole.¹⁷⁸ Further, the tenant alone takes the risk of loss arising from the state of the market to which he takes his wares,¹⁷⁹ in the same way as he takes the risk of the quality and quantity of the produce; nor will the landlord be responsible for gradual deterioration of the soil, short of sterility, or for the effects of ordinary weather and diseases. 'Increase in the depth of a mine or accumulation of water in a mine does not give liberation or abatement to the lessee, although the addition to the expense of working should create positive loss.'¹⁸⁰ The case of loss due to a supervenient law has been already noticed.¹⁸¹

Loss at
tenant's risk.

Beyond the region thus excluded, there are circumstances in *Rei interitus*. which there is such *rei interitus* as to liberate the parties from their mutual obligations, or such loss or destruction of part of the subject let, as to entitle the tenant to claim abatement. If lands are rendered absolutely unproductive by being overblown with sand,¹⁸² or permanently sterile by inundation, or are carried beyond bounds by avulsion,¹⁸³ or if houses be made untenable or uninhabitable by being burnt,¹⁸⁴ the tenant may abandon, unless the landlord offers restoration within a reasonable time. The delicacy of the questions which may arise out of this rule are indicated by Lord Shand in the following words:—'In determin-

¹⁷⁶ Ersk. 2.6.41; Mack. 3.3.5.

¹⁷⁷ Gowans v. Christie, *supra*, ¹⁷², at 11 M. (H.L.) 2.

¹⁷⁸ See obs. of Ll. Chelmsford and Cairns in 11 M. (H.L.) 7, 11; L. Neaves' illustration of the years of plenty and scarcity in Egypt—Fleeming v. Baird, 1871, 9 M. 730, 735; B. Pr. 1208; More's Notes, 95.

¹⁷⁹ Dixon v. Campbell, 1824, 2 Sh. Ap.

175.

¹⁸⁰ 2 Hunter, 425, quoted with approval by Lord Colonsay at 11 M. (H.L.) 8.

¹⁸¹ *Supra*, p. 198.

¹⁸² Lindsay v. Home, 1612, M. 10120.

¹⁸³ Futt v. L. Ruthven, 1671, 2 B.S. 504.

¹⁸⁴ Duff v. Fleming, 1870, 8 M. 769; Allan v. Markland, 1882, 10 R. 383.

'ing the question whether the subject was entirely or in a
 ' material part so destroyed as to make it unfit for the purposes
 ' for which it was let, a case of destruction is not made out
 ' by showing that the premises have been made uncomfortable,
 ' and, I would add, unsuitable for the purpose of the lease for
 ' a short time. The question whether the premises have been
 ' made unfit for the purpose of the tenant's occupation is one of
 ' degree. While, on the one hand, if a dwelling-house or shop
 ' has been so destroyed as to be either permanently unfit for
 ' occupation, or to be unfit for occupation for such a length
 ' of time that it would be obviously unreasonable to require
 ' the tenant to continue his possession, the tenant shall be free ;
 ' yet on the other hand, when such a calamity as a fire, affecting
 ' both parties, has accidentally occurred, a tenant may reasonably
 ' be called on to submit to considerable inconvenience as the
 ' natural and often necessary consequence ; and if the injury to
 ' the premises be short of destruction, and the damage may be
 ' repaired within such a time that the term " considerable in-
 ' " convenience " would fairly describe all that the tenant has
 ' to undergo, he is not entitled to throw up his lease, but is
 ' bound to give his landlord an opportunity of having the
 ' damage repaired, insisting, as he is no doubt entitled to do,
 ' that no time shall be lost in having the premises restored
 ' to their former condition.'¹⁸⁵ So that a tenant of a house
 of three storeys was entitled to abandon when each storey
 was so destroyed by fire as to be unfit for occupation,
 and the repairs amounted to more than half the value of
 the house, and took seven weeks to execute ;¹⁸⁶ and the
 tenant of a workshop considerably injured by fire ten days
 before the date of his entry, and not put into tenantable con-
 dition (as it turned out) for a month more, was held entitled to
 refuse to enter.¹⁸⁷ But the tenant of a front and back shop was
 refused the remedy of abandonment where the back shop was
 seriously, the front shop scarcely at all, injured by a fire. The
 work of the shop might have gone on during repairs which could
 have been executed in little more than a week, at little more
 inconvenience than what is caused by ordinary repairs.¹⁸⁸ In
 such cases it would probably be held that the tenant is entitled

¹⁸⁵ In *Allan v. Markland*, at 10 R. 389.

¹⁸⁶ *Duff v. Fleming*, *supra*, ¹⁸⁴.

¹⁸⁷ *Drummond v. Hunter*, 1869, 7 M.
347.

¹⁸⁸ *Allan v. Markland*, *supra*, ¹⁸⁴, revg.
L. Lee, diss. L. Deas. The two sets of

cases are clearly distinguishable. L.P.
 Inglis thought the position of the tenant
 —a wholesale dealer with other places of
 business— a material circumstance, 10 R.
 395.

to some abatement of rent corresponding to the interval of dis-possession or disturbed possession.

The question has arisen how far these rules apply to leases of minerals, which may be regarded as sales at a price payable by instalments, and are more or less of a speculation. There can be no doubt that complete exhaustion liberates the lessee;¹⁸⁹ on which account it is important to provide for a lordship as well as a rent. Constructive exhaustion or sterility has the same effect, as for instance where the seam let is unworkably thin;¹⁹⁰ but it would probably not now be held that foul air, a bad roof, and such physical obstacles need make the tenant despair.¹⁹¹ It may be gathered from modern cases that the tenant will not be exempted from the performance of his part of a mineral lease, in the absence of stipulation, unless there be exhaustion actual or constructive, or unless no mineral such as was let ever existed in the premises.¹⁹² It is usual, however, to make special provision for breaks at certain intervals, or for abandonment whenever the unworkableness of the mineral is ascertained by arbitration or otherwise as stipulated;¹⁹³ and then the ascertainment in the way prescribed is a condition precedent to abandonment.¹⁹⁴

In all cases the tenant must declare his abandonment of the lease without undue delay,—the period allowed being as diverse as the circumstances of each case. Thus intimation of abandonment given three days after the term of entry to a house, which had been injured by fire before the term, was not too late.¹⁹⁵ But where a mineral lease provided for its termination when the coals were worked out or were found by arbiters to be unprofitable, it was no relevant defence to an action for arrears of rent to allege exhaustion, since it was the duty of the tenant to take the initiative and have the fact ascertained in the manner stipulated.¹⁹⁶ Where two years were allowed in a mineral lease for proving the field, sinking pits, and erecting machinery, without rent, and the tenant possessed on for six months into the

¹⁸⁹ *Wilson v. Mader*, 1699, M. 10125; *Murdoch v. Fullerton*, 1829, 7 S. 404; and see *Gowans v. Christie*, 1871, 9 M. 485, aff. 11 M. (H.L.) 1.

¹⁹⁰ *Gray v. Hog*, 1706, 4 B.S. 635.

¹⁹¹ *Edmiston v. Preston*, 1675, M. 15172; noticed by L. Chan. Selborne at 11 M. (H.L.) 5.

¹⁹² *Gowans v. Christie*, *supra*, ¹⁸⁹; *Fleeming v. Baird*, 1871, 9 M. 730. See

case of special power granted to a *curator bonis* to reduce mineral rent, *White v. Moncreiff*, 1849, 11 D. 1031.

¹⁹³ *Infra*, chap. xx.

¹⁹⁴ *Waddell's Trs. v. Monkland Iron Co.*, 1885, 13 R. 237.

¹⁹⁵ *Drummond v. Hunter*, 1869, 7 M. 347.

¹⁹⁶ *Thomson v. Gordon*, 1869, 7 M. 687; see *Lowndes v. Buchanan*, 1854, 17 D. 63.

third year, it was no answer to a claim for the rent of that year that the field was sterile.¹⁹⁷

Insurance.

Insurance
clause.

While the injustice which might arise from an enforcement of the strict rule of exacting mineral rent as long as the subject remains is usually mitigated by special clauses directing an inquiry into the profitableness of the workings, the loss due to another fatality, more common than the exhaustion of a mine, is provided for by an Insurance clause. This clause is not commonly to be found in leases of buildings separately let for dwellings, shops, or mills,¹⁹⁸ since if the landlord insures his building and the tenant his machinery or furniture, the tenant's option to abandon or claim abatement of rent sufficiently secures that no unavoidable hardship to either party shall follow destruction or injury by fire. It is different in the case of a farm, where the buildings are really part of the tools of the farmer's trade, and where possession of these tools, though it may not be of vital, is of great, importance in the conduct of the farm. Accordingly it is usually stipulated that, whereas the lessor has insured or will assure the houses and buildings against fire, the tenant shall defray one-half of the annual premium, 'declaring 'that in the event of the destruction of the said houses and 'steading, or any part thereof by fire, [the proprietor] shall 'be entitled to recover the sums due under the policy or policies 'of insurance effected or to be effected as aforesaid; and the 'tenant shall have no claim whatever against the proprietor 'on account of such fire, except that the proprietor shall be 'bound to apply the sums to be recovered as aforesaid in or 'towards the restoration of such houses and steading or parts and 'portions thereof as shall have been destroyed, the proprietor being 'always entitled to settle in what manner the said sums shall be 'applied in or towards the purposes foresaid as he shall think best, 'without the consent or any control on the part of the tenant.'¹⁹⁹

No obligation
to insure at
common law.

In judging of the effect of such a clause, it must be borne in mind that, without special stipulation, neither party is bound to insure, any more than to restore what is destroyed.²⁰⁰ There-

¹⁹⁷ *Sinclair v. Mossend Iron Co.*, 1854, 17 D. 258.

¹⁹⁸ Except that in the case of mills the tenant binds himself not to change the mode of working from that stipulated in the policy without notice, 1 Jur. Styles (5th ed.), 594. In the case of a furnished house, there is sometimes an obligation

on the tenant to pay half the premium, *ibid.* 701; other cases, *ibid.* 684 *et seq.*

¹⁹⁹ 1 Jur. Styles, 576, 585, 595; or the whole premium, 598. There are variations in these forms, but the meaning is substantially the same.

²⁰⁰ *D. Hamilton's Trs. v. Fleming*, 1870, 9 M. 329, 338.

fore, if the clause above narrated had stopped short before the 'declaration,' it would have been conceived wholly for the benefit of the landlord, who would not have been obliged to expend the money recovered by him in restoration, and, as to the tenant, would have simply added the half or the whole of the premium to his rent.²⁰¹ If, in pursuance of the declaration, the landlord makes a complete restoration, he does so either because the insurance money is sufficient, or of his own free will, for he is not obliged to spend a penny more than he recovers from the company. There is greater security against lapse of the policy through non-payment of the premium when the policy runs in the landlord's name than when there is a mere obligation laid on the tenant to insure in his own.²⁰² By statute any party interested in or entitled to a building may, if there be suspicion that the owner or occupier or other insurer has been guilty of fraud or of wilful fire-raising, request the insurance office to lay out the insurance money in restoration of the building.²⁰³ This request must be made before the office has settled with the insured.²⁰⁴ Both landlords and tenants are parties 'interested' in the sense of the statute.²⁰⁵ Where the tenant insures for his own benefit erections which he is to be entitled to remove, or to be compensated for at removing, the landlord can have no claim to the insurance money, if the erections are burnt, other than as an ordinary creditor.²⁰⁶ But if the tenant insures his stock or crop, the view seems to have been taken in one case that the insurance money comes in as a *surrogatum*, and that the landlord has a preference over it in virtue of his hypothec for payment of the rents secured by hypothec.²⁰⁷

(3) *Interdict.*

Lastly, the tenant is entitled to restrain by interdict any threatened or inchoate encroachment on his right of possession, exclusive so far as it goes, by the landlord.²⁰⁸

²⁰¹ *Ibid.* : under a clause substantially to the same effect as the leading obligation above.

²⁰² See the English cases of breach and its effects in Woodfall, pp. 654, 329. It runs with the lands ; *ibid.*

²⁰³ 14 Geo. III. c. 78, sect. 83, still in force (see 18 & 19 Vict. c. 122, sect. 109), and not confined to London. *Ex parte Goreley*, 34 L.J. Bankt. 1.

²⁰⁴ *Simpson v. Sc. Union Ins. Co.*, 1 H. and M. 618.

²⁰⁵ *Semle* as to tenants, Woodfall, pp. 409, 653.

²⁰⁶ This seems to be the gist of part of *Sc. Union Ins. Co. v. Mackintosh*, 1830, 9 S. 310.

²⁰⁷ *Ibid.* The point was given up, *sed quare*, the assurance being entirely voluntary, and the *rei interitus* purely accidental.

²⁰⁸ *Alexander v. Couper*, 1840, 3 D. 249 ; *Blanc v. Greig*, 1856, 18 D. 1315 ; *Hood v. Miller*, 1855, 17 D. 411 ; *Johnston v. Constable*, 1841, 3 D. 1263 ; *Begbie v. Frame*, 1857, 20 D. 81 ; *Brown v. Robertson*, 1822, 1 S. 448 (N.E. 416) ; *Thomson v. Brown*, 1822, 1 S. 475 (N.E.

B. THE TENANT'S OBLIGATION TO TAKE AND RETAIN POSSESSION. INVERSION.

1. To take Possession.

Damages for breach.

The tenant is under obligation to take possession;²⁰⁹ and action to compel him to implement the lease 'by entering into 'possession of the premises and paying the rent when due,' is competent in the Sheriff Court, though it may involve a question as to the existence of a binding lease.²¹⁰ Breach of this obligation infers liability for damages,²¹¹ and in the case of certain subjects, such as farms and dwelling-houses, the amount of damages may be a substantial sum, since deterioration of the premises and dislocation of management readily follow on want of occupation. It seems to be the better opinion, that the executors of a deceased tenant are liable to the landlord for loss caused by the refusal of the heir to enter and fulfil the obligations of the lease.²¹² The lack of some non-essential part of the subject let,²¹³ or the fact that the former tenant remained in actual possession is no excuse for failure to enter.²¹⁴

2. To retain Possession.

Landlord's remedies.

There is the further obligation to retain and not abandon possession unless there have been a lawful transfer to an assignee or subtenant, or there be good legal ground—of which some illustrations have been already given—for abandonment. The landlord's remedy may be (1) to bring the lease to an end, in spite of colourable possession intended to evade a prohibition against assignation;²¹⁵ or (2) to sue for damages, in which case every direct ground of injury must be taken into account, such as the loss done to the custom of an inn by its being shut against customers for a considerable period;²¹⁶ or (3) to demand resumption of possession. This demand involves the corollary that the possession it requires shall be *bond fide*, and subject to the rules

442); *Hamilton v. Cunninghame*, 1830, 3 S. 955. Cf. *Addie v. Young*, 1862, 24 D. 799; and *Baxter v. Paterson*, 1843, 5 D. 1074, cases in which interdict would undoubtedly have been competent. See also cases of game, *infra*, chap. xviii.

²⁰⁹ St. 2.9.31; Bankt. 2.9.21; Ersk. 2.6.39; B. Pr. 1222; L. Randifuid v. Tenants, 1623, M. 15256 (action a few weeks after term of entry).

²¹⁰ *Robertson v. Cockburn*, 1875, 3 R. 21.

²¹¹ *Mathieson v. Nicolson*, 1819, 2 Mur. 141.

²¹² *Bethune v. Morgan*, 1874, 2 R. 186;

Scott's Exrs. v. Bethune, 1876, 3 R. 816; see *supra*, p. 154.

²¹³ *Duncan v. M'Dougal*, 1796, Hume 792.

²¹⁴ *Lisk v. Rob*, 1674, 1 B.S. 715.

²¹⁵ *Durham v. Henderson*, 1773, M. 15283; *E. Dalhousie v. Wilson*, 1802, M. 15311; *Monro v. Miller*, 11th Dec. 1811, F.C. 384; *Watson v. Douglas*, 13th Dec. 1811, F.C. 412; *Young's Trs. v. Anderson*, 1809, Hume 843.

²¹⁶ *Graham v. Stevenson*, 1792, Hume 781; see the stricter rule in England as to letting licenced houses, *Woodfall*, 670.

of good management, which will be examined in a later chapter.²¹⁷ It may be added, however, in order to prevent a misunderstanding of the import of the last-cited case, that where the subject let is an ordinary shop, the landlord is entitled to have the tenant ordained to place sufficient furniture in it to secure the hypothec; to keep proper fires in it and air it so as to prevent damp; but not to open it and carry on business in it.²¹⁸ A tenant who has unlawfully abandoned the subjects let to him is not entitled to reinstatement.²¹⁹

As a general rule possession may be taken and retained by the tenant's servants, family, grieve, or other persons on his behalf without his own permanent or even occasional residence. Cases, however, occur in which it is for the landlord's interest and it is agreed that the tenant himself shall reside on the premises let. And this obligation is frequently fortified by means of a conventional irritancy in case of breach. Residence clauses are chiefly to be found in agricultural leases, being a further security on the lines of that *delectus personæ* which is presumed to exist in such leases.²²⁰ The obligation runs in such terms as these, 'to live locally with his family yearly;' ²²¹ to 'occupy, cultivate, and be resident upon the premises;' ²²² to 'reside personally with his family on the farm.'²²³ In an early case, the interest of the landlord was said to lie in 'the not upholding of the houses so well and the want of fulzie,' and the tenant was ordained to reside and to pay such damages as might be proved to have arisen from past non-residence.²²⁴ In other cases the remedy sought has been the irritancy of the lease, and this follows whether there be or be not a conventional irritancy, the only difference being that in the former case the irritancy cannot be purged at the bar,²²⁵ while in the latter case the tenant's right is forfeited only if he persists in breaking the condition.²²⁶ A reasonable time will be allowed to a tenant succeeding to a lease so conditioned to consider as to entering.²²⁷ It is no

²¹⁷ *Infra*, chap. xvii.

²¹⁸ *Whitelaw v. Fulton*, 1871, 10 M. 27.

²¹⁹ *Taylor v. Maxwell*, 1728, M. 15310; *Taylor v. Taylor*, 1826, 4 S. 450, aff. 2 W. and S. 101.

²²⁰ *Supra*, pp. 143, 157.

²²¹ *Drummond v. M'Pherson*, 1799, M. Appx. Tack, 6.

²²² *Cameron v. Cameron*, 18th Dec. 1810, F.C. 90—a statutory requirement relating to the estates forfeited in last

century for rebellion.

²²³ *Edmond v. Reid*, 1871, 9 M. 782.

²²⁴ *Wallace v. Turners*, 1696, 4 B.S. 302.

²²⁵ See as to irritancies generally, *infra*, chap. xx.; *Cameron, supra*, ²²².

²²⁶ *Edmond*, ²²³; *Drummond*, ²²¹; *Stirling v. Miller*, 29th June 1813, F.C. 416.

²²⁷ *Stirling, supra*, ²²⁶; a year allowed, but the *annus deliberandi* has now been cut down, for other purposes, by a half, 31 & 32 Vict. c. 101, sect. 61.

Residence
stipulated for.

In farm leases.

excuse that the non-residence arises from circumstances beyond the tenant's control,²²⁸ such as fugitation or banishment,²²⁹ or public service furth of Scotland;²³⁰ or that the tenant's wife and family are resident;²³¹ or that he possesses through a manager or subtenants;²³² or that a furnished house is to be kept up on the farm, with a resident servant, and that the tenant will reside for ten days in every two months.²³³ It will be a question of circumstances in each case what amount of personal presence on the premises will satisfy the requirements of a residence clause.²³⁴

3. *Not to invert Possession.*

Inversion.

Ordinarily leases are granted with a view to a particular sort of possession, and to that only—the lease of a farm for agriculture or pasture; of a garden for horticulture; of a dwelling-house for residence; of a mill for manufacture; of a shop for trading, and so forth. If the tenant trespasses beyond the limits thus generally, or by special covenant more particularly, laid down for his guidance, he is said to invert the possession. The term ‘inversion’²³⁵ is, however, confined in practice to a course of conduct on the tenant's part inconsistent with the objects of his lease, and perhaps involving alterations on the premises let; and is not extended to isolated acts, such as (in the case of an agricultural tenant for example) night-poaching, trouting, or illegal trapping. The question in every case is as to the fair *bond fide* construction of the contract between the landlord and the tenant, as gathered from the words of the lease and the nature of the sort of occupation contemplated when it was entered into, subject to such alterations as have been tacitly or expressly imported into it during its course. It is impossible to formulate any rule; it is only possible to indicate the class of cases which have arisen in practice, and the mode in which they have been disposed of.

Cases.

Thus an agricultural tenant is not entitled to set up an ale-house on his farm,²³⁶ or to use a building on it as a posting station,²³⁷ or to use the stables and offices (with or without alterations) for the stated accommodation of stage-coach horses,²³⁸

²²⁸ Ivory's Note to Ersk. 2.6.44.

²²⁹ Drummond, *supra*, ²²¹.

²³⁰ Cameron, *supra*, ²²²; though the tenant was known to the lessor to be in military service at the date of the lease.

²³¹ Drummond, *supra*, ²²¹.

²³² Cameron, *supra*, ²²².

²³³ Edmond, *supra*, ²²³.

²³⁴ See the English cases cited in

Woodfall, p. 663. The covenant runs with the land.

²³⁵ Or ‘conversion,’ or ‘perversion.’ See 23 D. 1240.

²³⁶ Miln v. Mitchell, 1787, M. 15254.

²³⁷ Baillie v. Mackay, 1842, 4 D. 1520.

²³⁸ D. Argyll v. M'Arthur, 1861, 23 D. 1236.

whether by doing so he injures the trade of a neighbouring inn belonging to the same landlord or not;²³⁹ or to sublet land to a railway company to be used as a siding for general traffic.²⁴⁰ It is not lawful to build an addition to a dwelling-house on a piece of ground described in the lease as intended for a flower-plot;²⁴¹ or to set up a yarn mill in addition to a grist mill, since a mill tenant may not either partially or totally change the nature of the subject let, any more than an agricultural tenant can partially or totally cover the lands with buildings, or an urban lessee change the specification, nature, or description of the house let to him.²⁴² It is an illegal inversion to turn a market-garden into a place of public amusement;²⁴³ and the same has been held (though the point seems to admit of grave doubt) of the conversion of a shop formerly occupied by a silk-mercator into a show-room for the exhibition of wax figures and a 'monster.'²⁴⁴ But to let premises as a 'shop' does not import that they are to be exclusively used for the private sale of goods and that sales by auction are necessarily prohibited. This rule was laid down in a case where a great variety of businesses had been carried on in the past history of the shop; but it seems to be general.²⁴⁵ It seems to be lawful for a surgeon and apothecary to convert a shop let to him into a grocer's or huckster's shop.²⁴⁶ Premises not included in the subjects originally let, but awarded by arbiters as a pertinent necessary for their contemplated use, cannot be diverted from their use as pertinents only.²⁴⁷

The inversion is all the more objectionable if it involves structural alterations on the premises let.²⁴⁸ Thus, where subjects let to persons described as provision merchants were altered by the lessees so as to adapt them for the business of ham-curing, by removing joisting and wainscot and building up a chimney, it was decided that these were operations which could not be lawfully undertaken without the landlord's consent.²⁴⁹ A lease to an

Structural alterations.

²³⁹ He did so in both of these cases, but this interest is not necessary to give title to sue.

²⁴⁰ *Mercer v. Esk Valley Railway*, 1867, 5 M. 1024 (interim interdict). Cf. *Leck v. Merryflats Brick Co.*, 1868, 5 Sc.L.R. 619.

²⁴¹ *Inglis v. Balfour*, 1778, M. Appx. Tack, p. 34; see *Armstrong v. Bryceson*, 1807, Hume 837.

²⁴² *Ford v. Hillocks*, 1808, M. Appx. Tack, No. 17.

²⁴³ *Heriot's Hosp. v. Heriot's Gardener*, 1751, Elch. *Pact. illicit.* No. 20.

²⁴⁴ *Leechman v. Sievewright*, 1826, 4 S. 683 (N.E. 690).

²⁴⁵ *Reid v. Keith*, 1868, 6 M. 768, rev. 8 M. (H.L.) 110.

²⁴⁶ *Gordon v. Crawford*, 1825, 4 S. 95 (N.E. 97), by sublease. The point was not decided; but the difference of occupation does not seem vital.

²⁴⁷ *Walker, Grant & Co. v. Grant*, 1838, 1 D. 38.

²⁴⁸ *Muir v. Wilson*, 1822, 1 S. 406 (N.E. 380)—fire.

²⁴⁹ *Leck v. Fulton*, 1854, 17 D. 408.

upholsterer, with power to erect buildings for the purposes of his trade, included a house, a back-green, and a back-house described as a tailor's workshop. The entrance to the back-green and back-house was by a narrow passage which was also the access to two dwelling-houses above the front house. It was held, looking to the tenor of the contract and the nature of the access—which had never been used for the passage of animals—that the use of the back house as a stable was an inversion which the landlord was entitled to put a stop to.²⁵⁰ The inversion is aggravated if it creates or threatens a nuisance.²⁵¹

Special restrictions.

The lease may contain special restrictions with regard to the use to which the tenant may put the subjects let. It will be convenient, however, to postpone consideration of these restrictions to a later chapter which deals with the tenant's management.²⁵²

By assignees and subtenants.

What is unlawful for the lessee himself to do with his holding is equally unlawful for any assignee or subtenant; and an assignation or sublease granted for a purpose which if carried out would be an inversion of possession, is to that extent invalid.²⁵³

Obligation passed from.

The landlord's right to complain of an inversion may be extinguished by express renunciation, or by conduct clearly inferring acquiescence or consent. Thus, where subjects let on long lease had for a considerable part of its course been used as a bleachfield, the landlord was held not entitled, on the pretext that the lease had been granted for agricultural purposes, to interdict the erection of buildings in which it was intended to work up the by-products.²⁵⁴ A mill, described as a paper-mill, was, with the cognisance of the landlord, used by the tenant for six years as an oil-mill. His assignee used it as a grist-mill for about a year. The landlord, by his acquiescence, was held to have lost right to have it restored to its original use;²⁵⁵ but if the question had arisen, he would probably have been entitled to an alternative restriction to the original or the second use, the acquiescence having gone no further.²⁵⁶ Whether or not the lessee of a rabbit warren may permit a railway to be con-

²⁵⁰ *Hood v. Miller*, 1855, 17 D. 411.

²⁵¹ *Mowbray v. Ewbank*, 1833, 11 S. 714; *Muir v. Wilson*, *supra*, ²⁴⁸; *Skene v. Maberly*, 1820, 2 Mur. 352, 1 S. 369 (N.E. 347). Nuisance not made out in *D'Eresby's Trs. v. Strathearn Hydropathic Co.*, 1873, 1 R. 35 (irrigation with pure water); *infra*, chap. xxv.

²⁵² *Infra*, chap. xvii.

²⁵³ 1 B.C. 76; 2 B.C. 32; B. Pr. 1274; *More's Notes*, 248; *Ivory's Note to Ersk.*

2.6.33; 1 Bell, *Leases*, 184; *Anderson v. Alexander*, 10th July 1811, F.C. 327; *Leechman v. Sievewright*, ²⁴⁴; *Gordon v. Crawford*, ²⁴⁶.

²⁵⁴ *Skene v. Maberleys*, 1822, 1 S. 369 (N.E. 347). See issues there; *M'F. 230*; *Ferguson v. Methven*, 1857, 19 D. 794.

²⁵⁵ *Young & Co. v. Ramsay*, 1824, 2 S. 793 (N.E. 655), *aff. 1 W. and S. 560*.

²⁵⁶ See 1 W. and S. 565.

structed and used across the warren without agreement with the landlord,²⁵⁷ the latter will be barred from objecting by acquiescence for nearly twenty years.²⁵⁸ On the other hand, non-use of powers fairly falling within the subjects let is to be regarded as *res meræ facultatis*, not as restricting the grant or as a measure of its scope. Consequently, very ample powers over the water on an estate were held to permit of the formation of a navigable canal and towing-path where, for a long period, there had been only a lade or goit.²⁵⁹

²⁵⁷ Probably not ; *supra*, p. 215, and 2 476.

Hunter, 445.

²⁵⁸ Ewan's Trs. v. Muirkirk Iron Co.,

²⁵⁹ D. Portland v. Samson, 1843, 5 D. 1850, 12 D. 622.

CHAPTER XI.

REPAIRS.

Invecta et illata
on subjects let.

Repairs.

Improve-
ments.

Fixtures.

Landlord's fur-
nishings.

By an easy transition from the law of possession under leases, we pass on to that large part of the law of landlord and tenant which is concerned with certain operations performed, or things situate, on the subjects let, and the rights and obligations connected therewith. It is difficult, if not impossible, to draw logical distinctions in this matter, and in practice the whole of the questions which occupy this chapter and the two following chapters are often inextricably intermingled; but it will be convenient, as far as possible, to adhere to the nomenclature which distinguishes between repairs, improvements, and fixtures. By repairs are meant such operations on the subject let as are necessary to put and maintain it in a condition fit for the purpose for which it was let. Everything over and above repair is melioration. Improvements are, in the stricter sense which is here adopted, such meliorations, being operations on, or additions to, the subject let as are not recoverable or removeable *in specie*. Fixtures, on the other hand, are here taken to mean such additions to, or erections on, the premises as are removeable *in specie*. The order of exposition follows the order of time, for questions as to repairs may arise at the inception of a lease or during any part of its currency, or at the end; questions as to improvements (except in so far as involved in the settlement of the terms of the contract) can only appear during the course or at the termination of the lease; and the sole question (as between landlord and tenant) relating to fixtures can only arise at the outgoing,—viz., whether the tenant is entitled to remove them when he leaves. The law of ‘landlord’s furnishings,’ that is, of appurtenances furnished by the landlord for the use of the tenant, without being annexed to the premises, will be conveniently considered in connection with fixtures. While ‘tenant’s

‘plenishing’ may fitly be left over to the chapters which deal with rent and the security for payment of rent.¹ Tenant's plenishing.

As has been already indicated,² a lease implies a warrantice on the landlord's part that its subject is reasonably fit for the purpose for which it is let.³ Warrantice of reasonable fitness. The rule is only of value where the subject let, or part of it, consists of artificial structures, such as buildings, fences, and the like. The purpose of letting and taking a farm is cultivation, and every farm is capable of being cultivated. The purpose of letting an untried mineral field is to allow the tenant to experiment on the existence of the mineral and win it when found, and any piece of land is patient of such experiment. The lessee of a salmon fishing takes a similar risk. But if a house is let for a dwelling, or a mill, or a shop, it must be fit to live, work, or trade in; and if fences are let as part of a farm, they must be real barriers. If the immediately preceding possessor left them in a condition not corresponding to the implied warranty, they must be repaired by the landlord.

I. IN URBAN LEASES.

The rule, as applied to urban tenements, is that they shall be put into habitable and tenantable condition by the landlord at entry.⁴ Subjects to be put into tenantable condition. This common law obligation is not confined as in England to furnished houses.⁵ So that the 12th section of the Housing of the Working Classes Act, 1885,⁶ was not needed in Scotland, however salutary a reform it may have operated in England. It enacts that—

In any contract made after the passing of this Act for letting for habitation by persons of the working classes a house, or part of a house, there shall be implied a condition that the house is, at the commencement of the holding, in all respects reasonably fit for human habitation. In this section the expression ‘letting for habitation by persons of the ‘working classes,’ means the letting for habitation of a house or part of a house at a rent not exceeding . . . in Scotland . . . four pounds.

The question whether a house is tenantable and habitable is one of fact to be determined on a proof, or by remit to a man of skill; and the determination will greatly depend on the class of house let and the degree to which it has the advantage of modern How ascertained.

¹ *Infra*, chaps. xiv., xvi.

² *Supra*, p. 195.

³ Ersk. 2.6.39; B. Pr. 1253; cf. 19 & 20 Vict. c. 60, sect. 5.

⁴ Bankt. 1.20.15; 2.9.20; Ersk. 2.6.43; as to tenantable house, see Brodie v.

Cash, 27 J. of Jurisp. 611; *Marianski v. Jackson*, 1872, 9 Sc.L.R. 480.

⁵ *Wilson v. Finch-Hatton*, 2 Exch. Div. 336, and cases there.

⁶ 48 & 49 Vict. c. 72, passed in August 1835.

improvements, such as gas, water, and drainage, with their attendant drawbacks in the necessity of constant supervision and upholding.

And so upheld.

The landlord of an urban tenement is further bound, unless it be otherwise stipulated, to uphold it in a tenable and habitable condition during the course of the lease.⁷ When this obligation is express, it is usually and sufficiently conceived in such terms as these: 'To keep the house wind and water tight and in 'proper tenable condition during the whole currency of this 'lease.'⁸ There are two exceptions. The landlord is not liable

Exceptions.

Tenant's remedies: to repair.

for deterioration or destruction which results from the negligence or fault of the tenant himself,⁹ nor for the consequences of *damnum fatale* or pure accident. If the landlord declines to make the repairs, the tenant may take them in hand and deduct from his rent what was *bond fide* disbursed in simply repairing,¹⁰ or he may, for greater security, before commencing operations, apply to the Dean of Guild or Sheriff, whose warrant, proceeding on the estimate of tradesmen, will be evidence both of the necessity and of the expense of repairing.¹¹ If injury is caused to the tenant through want of repair, it is important to observe whether it existed *ab initio* or only supervened after entry, for the issues appropriate to the two cases are different, and cannot be combined.¹²

The result of a breach by the landlord of either obligation may be to make him liable for damages; or to entitle the tenant to refuse or renounce possession, or to retain rent.

Claim damages.

(1) Tenants have been found entitled to damages where, on account of dilapidation in the roof of house, which the landlord had refused to repair, the fall of a neighbouring 'tower of 'Babel' on it converted it into a ruin;¹³ where a lower flat was injured for months through the unroofing of the tenement by the proprietor of the uppermost flat (for the purpose of heightening the house) with the lessor's consent;¹⁴ and where on account of

⁷ Bankt. 1.20.15; 2.9.20; Ersk. 2.6.43. See as to keeping a house dry by firing, *Whitelaw v. Fulton*, 1871, 10 M. 27; and as to latent defect, *Harbison v. Robb*, Guthrie's Dec. 287.

⁸ 1 Jur. Styles (5th ed.) 684.

⁹ *Sutherland v. Robertson*, 1736, M. 13979; *Hardie v. Black*, 1768, M. 10133; *M'Lellan v. Ker*, 1797, M. 10134.

¹⁰ Ersk. 2.6.43. See *Baird v. Inglis*, 1671, 2 B.S. 562; *Hamilton*, 1667, M. 10121; *Deans v. Abercrombie*, 1681, M.

10122; *Hodge v. Brown*, 1664, M. 13400 (profitable expenses).

¹¹ Ersk. 2.6.43. See case in which the true owners were held responsible for repairs, though the contract was made not with them, but with a person whom they held out as such—*Dunn v. Livingston*, 1828, 7 S. 218.

¹² *Goskirk v. Edin. Rail. Station Access Co.*, 1863, 2 M. 383.

¹³ *Hamilton*, *supra*, ⁹.

¹⁴ *Deans v. Abercrombie*, *supra*, ⁹.

the faulty construction of the roof an unusual quantity of snow accumulated, and the water, when thaw came, soaked through the woodwork under the slates and injured goods in the shop below.¹⁵ In the last case it made no difference that the snow-storm was exceptionally severe; that the tenant was not at home to prevent or minimise the injury; and that similar, though not so much, injury had been done on a former occasion without giving rise to complaint.

(2) In certain circumstances a tenant may refuse to take Or abandon possession and throw up the lease;¹⁶ or, having taken it, may suspend possession for a time; or definitively renounce possession, and with it the lease itself. Thus, where on entry to a dwelling-house the tenant found it to be overrun to a great extent and in every part with cockroaches; to be infested with bugs; to have an offensive smell; and one of the bedrooms to be too damp to be safely used, the Court held that the condition of the house was such as to render a tenant's life 'substantially 'uncomfortable;' and, since the nuisance was not easily or readily removeable, and there was, after fair notice, no offer on the landlord's part to remove it, that the tenant was not bound by the lease.¹⁷ The tenant of a house, the lease of which expired at Whitsunday, finding that the drains were radically deficient, and that fever had in consequence attacked his children, removed in the end of the preceding February. The landlord had the drains put in order, but the operation took two months. It was held that the tenant was not bound to return into possession thereafter, and that he was relieved from liability for any part of that half-year's rent through the landlord's failure to supply him with a habitable house for so considerable a period. Shortly before removing, and when in ignorance of the defects in the drainage, he had offered to take the house from Whitsunday for two years more. The Court was clearly of opinion (though the point did not require to be decided) that he was not bound to enter into possession under this new agreement.¹⁸

(3) The law of retention of rent deserves on account of its Retention of complexity and will receive separate treatment.¹⁹ rent.

The mode in which these common law rights and obligations Altered by stipulation.

¹⁵ Reid v. Baird, 1876, 4 R. 234.

¹⁶ The case is *a fortiori* of Drummond v. Hunter, 1869, 7 M. 347, *supra*, p. 208.

¹⁷ Kippen v. Oppenheim, 1847, 10 D. 242.

¹⁸ Scot. Heritable Sec. Co. v. Granger,

1881, 8 R. 459 (the rubric is inaccurate, since the point about resumption of possession under the old lease was involved in the question of liability for rent, and was decided as above).

¹⁹ *Infra*, chap. xiv.

are varied by express stipulation usually consists in throwing the burden of upholding the subjects in tenantable and habitable condition on the tenant, thus putting him under the same obligations as an agricultural tenant.²⁰ The burden of keeping the houses wind and water tight is sometimes retained by the landlord,²¹ who will, unless it be otherwise stipulated, be liable also for the extraordinary repairs necessitated by lapse of time, natural decay, or mere tear and wear.²²

II. IN AGRICULTURAL LEASES.

Lessor to put
into tenantable
repair.

The lessor is under an implied obligation to put the houses, offices, and fences on a farm at the lessee's entry into the condition which is known as 'tenantable repair,'²³ that is, such a condition as will render them (or at least the houses and offices, for fences may require renewal before the close of an ordinary agricultural lease) capable of lasting, with ordinary care, to the ish;²⁴ and also to furnish such buildings as will enable the tenant to cultivate the land according to the mode contemplated in the lease.²⁵ Two cases, in which *dicta* to the contrary are to be found, were decided on specialties: in the earlier, on matter of procedure and on some evidence of contrary stipulation;²⁶ in the later, on the ground that the subject was a small tenement let for one year by a liferenter.²⁷ But the rule does not apply to a lease of the *universitas* of an estate already mainly under tenantry.²⁸

Lessee to
uphold.

The correlative obligation of the lessee at common law is to maintain and uphold the houses and fences (and gates as part thereof) during the lease, and leave them at his removal in the same tenantable state as he received them.²⁹ The landlord has a preferable claim for ascertained damages in case of breach.³⁰ He is

²⁰ *Infra* on this page; Napier v. Ferrier, 1847, 9 D. 1354; Ewing v. Chalmers, 1835, 14 S. 69 (damages for taking down shelving).

²¹ 1 Jur. Styles, 687.

²² As to manufacturing utensils, see Sellers v. Brown, 1776, Hailes 131.

²³ Bankt. 1.20.10, 2.11.21; Ersk. 2.6.39; B. Pr. 1253, and see 141; Buchanan v. Stark, 1776, 5 B.S. 515.

²⁴ See obs. on effect of custom of district in judging of this, *per* L.P. in Mossman v. Brockie, 1810, Hume 850.

²⁵ Barclay v. Neilson, 1878, 5 R. 909. See as to express obligation to furnish stobs and nails, Burrell v. Gebbie, 1868,

6 Sc.L.R. 187.

²⁶ Haining v. Grierson, 1807, Hume 829.

²⁷ Harrold v. Pollexfen, 1844, 6 D. 1103.

²⁸ Belschies v. Caddell, 1776, 5 B.S. 516, Hailes 688 (the judgment proceeded on want of express stipulation, but that was only needed on account of the peculiarity of the subject let).

²⁹ Bankt.: Ersk., *supra*, 23; B. Pr. 1254; Whites v. Houston, 1707, M. 15258; see Campbell v. Brown, 1776, 5 B.S. 518.

³⁰ Munro v. Fraser, 1858, 21 D. 103 (by retention, or if a bankruptcy trustee takes up the lease).

not entitled to increase the burden of up-keep by erecting additional subdivision fences during the lease; but it is different with march-fences, which either neighbour may at any time compel the other to concur in erecting—a fact of which tenants taking leases of open land must be held to be cognizant.³¹ The tenant's liability is subject to two exceptions. It does not extend to loss caused by *damnum fatale*, such as an extraordinary hurricane,³² or by pure accident, such as an accidental fire. Nor does it extend to the natural decay which results from the lapse of time (tear and wear) or essential defect of structure, necessitating such thorough repair as implies extraordinary expenditure.³³ This obligation to uphold is a qualified assurance quite different from, and superadded to, the ordinary obligation to indemnify for specific negligence.

The rights and obligations of parties with regard to repairs are usually regulated by special clauses,³⁴ which may either alter or leave unchanged these common law rules; and there is a distinct advantage in either case in providing for a reference of disputes to arbiters or valuers. Sometimes on the lessee's entry an inspection is made by persons appointed by him and the lessor, and the state of the subjects having been thus ascertained, and the necessary repairs executed, the lessee agrees to take the subjects over as in tenantable condition. Or a valuation is taken: an inventory,³⁵ called the landlord's inventory, is framed with a note of values; and at the ish a similar process takes place, and the difference of value in case of deterioration is paid by the lessee.³⁶ Or, more commonly, the landlord assigns to the incoming tenant his right to demand of the outgoing tenant that the premises shall be delivered in

Exceptions.

Clauses as to repairs.

Valuation.

³¹ *Dudgeon v. Howden*, 23rd Nov. 1813, F.C. 458; Acts, 1661, c. 41; 1685, c. 39; 1669, c. 17. Mack, obs. *ad loc.*; Rankine, Landownership, 510.

³² *York Buildings v. Adams*, 1741, M. 10127; *More's Notes*, 252; *Clark v. Baird*, 1741, M. 10128 (in both cases there was a special repair clause equivalent to the common law obligation. In the latter, the odd limitation in the interlocutor of the tenant's liability to such loss as an ordinary storm would have caused deserves reconsideration).

³³ 1 Bell, Leases, 238, 321, 341; B. Pr. 1254; *Mossman v. Brocket*, 1810, Hume 850; *Napier v. Ferrier*, 1847, 9 D. 1354 (house with special clause); and see

Taylor v. Brown, 1800, Hume 308 (ferry boats). See the doctrine of *salvæ rei substantiæ* in *liferents*, Rankine, Landownership, 619.

³⁴ See a clause construed to apply both to houses and fences, *Graham v. Gordon*, 1841, 3 D. 479, var. 2 Rob. Ap. 251; as to embankment against a stream, *Scott v. Tait*, 1826, 4 Mur. 57.

³⁵ Stamped in accordance with 33 & 34 Vict. c. 97, sect. 38, and schedule, *voce* Appraisalment.

³⁶ See *Sinclair v. Manson*, 1821, 1 Sh. Ap. 1; *Jolly v. Graham*, 1827, 6 S. 236, 7 S. 824, rev. 5 W. and S. 230; *Macra v. Mackenzie*, 1828, 6 S. 935.

tenantable repair, and the tenants submit the question of the amount of repair which is necessary to referees. If the subjects are taken over as in tenantable order, and the erections, when accepted as in the condition they were in at entry, were very old and in bad order, the rule which relieves the tenant of any duty to reconstruct what has gone to decay by tear and wear will be enforced, though he came under a special obligation to uphold and leave tenantable.³⁷

Improvements
not set against
repairs.

Unless there be a valuation (as in the second of the above modes), pointing to a comparison of the values of buildings and fences in lump at entry and ish, as the criterion of obligation,³⁸ the tenant at ish cannot free himself from responsibility for disrepair of some of these erections by proving a greater amount of melioration of others, since this melioration (according to the rule which will be examined in next chapter) is regarded as having been made for his own accommodation only.³⁹

Use of timber.

The tenant is not entitled to use the timber on the farm gratuitously in repairing, unless he have special authority.⁴⁰

Mora.

The right of the landlord or incoming tenant will not be readily held to be renounced through delay in making a claim.⁴¹ But in one case a tenant lost all right to damages for breach of the obligation of the lessor (an heir of entail) to put the buildings in repair, first, in a question with the succeeding heir, by renouncing the lease 'and all claim, interest, or advantage therein;' and secondly, in a question with the lessor's representatives, by possessing under the lease for eight years without complaint.⁴²

Sum allowed
for repairs.

If the tenant is allowed a certain sum for repairs, all he has to show is that the premises are in good repair; unless there be a special obligation to produce vouchers.⁴³

Repair and
melioration.

Questions have naturally arisen as to what is to be regarded as repair and what is to be viewed as melioration, where the tenant has a conventional right to recompense for the latter, but not for the former. Thus it was held by the House of Lords, that where a tenant was bound to uphold the houses and leave them in tenantable repair, and had power to build an additional stading,

³⁷ *Mossman v. Brocket*, *supra*, 33.

³⁸ *M'Donald v. Robertson's Trs.*, 1830, 8 S. 974. See scope of obligation in *E. Mansfield v. Caird*, 1884, 21 Sc.L.R. 720.

³⁹ *Whites v. Houston*, 1707, M. 15258.

⁴⁰ *L. Touch v. Ferguson*, 1664, M. 15252.

⁴¹ *Adamson v. Marshall*, 1676, M.

11630 (nine months after removing not enough); *Dickson v. Graham*, 1877, 4 R. 717 (3½ months, but an *ex parte* report was communicated to tenant two days before ish); *Wight v. E. Hopetoun*, 1858, 20 D. 955 (at each renewal).

⁴² *Waterson v. Stewart*, 1881, 9 R. 155.

⁴³ *Dalziel v. Lockhart*, 1765, M. 15260.

with a claim for recompense at the ish, he was only entitled, if he pulled down the old houses, to so much of the value of the new steading put in their place as ought to be considered as an additional steading; and further, that his claim was for the value to the landlord or incoming tenant at the ish (*in quantum lucrati sint*), not for the amount of his outlay.⁴⁴ There is, in practice, little difficulty in distinguishing between those operations which are necessary for preservation and for repairing the effects of negligence or fault; improvements proper, which being useful add to the value of the premises, into whose hands soever they may come; and ornamental additions and operations as to which a tenant, even though he has right to recompense for improvements, is not entitled to claim.⁴⁵ Thus a landlord bound to repair is not obliged to furnish an improved apparatus used in manufacture;⁴⁶ nor is a tenant, who is bound to keep the dykes in a proper fencible condition, obliged to make new enclosures.⁴⁷ An obligation incurred expressly by the landlord to put the whole steadings into a good and sufficient tenantable condition refers solely to the buildings actually in existence at the date, and does not infer an obligation to erect new buildings, however necessary for the tenant's accommodation.⁴⁸

In this matter of repair, a distinction is drawn between improvements made by the tenant which he is not allowed to remove (such as houses), and fixtures put by him on the land (such as wire fences, palings, and the like). The former he cannot dilapidate by carrying off the materials,⁴⁹ but, on the other hand, he does not require to leave them in good repair; as to the latter he must either remove them or leave them in good repair.⁵⁰

Repair of improvements and fixtures.

III. IN MINING LEASES, &C.

In mining leases it is usual to bind the tenants to fence the Mines. part of the surface occupied by them—the roads, railways, tramways, and pit-mouths—and to uphold the fences so made, and to take the risk of accidents;⁵¹ to enclose all pits when abandoned,

⁴⁴ *Sinclair v. Manson*, 1821, 1 Sh. Ap. 1; as to the latter point, see *Frier v. E. Haddington*, 1871, 10 M. 118.

⁴⁵ *The impensæ necessariae, utiles, voluptuariae* of the Romans. See authorities collected in Rankine, *Landownership*, p. 79, note.

⁴⁶ *Dick v. Robertson*, 1776, 5 W.S. 515.

⁴⁷ *Macmaster v. Cameron*, 1812, Hume 858.

⁴⁸ *Ewing v. Crawford*, 1844, *n.r.* 2

Hunter, 210; see *Douglas v. Jones*, 1833, 11 S. 741 (operations of judicial manager).

⁴⁹ *Murray v. Bisset*, 1805, Hume 818.

⁵⁰ *Andrew v. Morison*, 19th Jan. 1811, F.C. 152; *Oliphant v. Thomson*, 8th Feb. 1822, F.C., 1 S. 307 (N.E. 284); *D. Buccleuch v. Tod's Trs.*, 1871, 9 M. 1014; see B. Pr. 1254; *More's Notes*, 252.

⁵¹ Such as in *M'Feat v. Rankin's Trs.*, 1879, 6 R. 1043; *M'Lean v. Warnock*, 1883, 10 R. 1052.

- and, if required, to fill up abandoned pits and ingoing eyes ; to repair existing fences injured by them ; to restore and soil over the surface when no longer required by them and at the ish ; to leave accommodation works in good order :⁵² to pay for surface damages ; and to accept buildings as in repair, and leave them so.⁵³
- Quarries. Lessees of quarries are taken bound to keep the fences free from rubbish ; to deposit the mould removed by them in places pointed out by the landlord ; to attend to his directions as to the disposal of tarring and rubbish ; and to fence and keep fenced the workings.⁵⁴
- Mills. Leases of mills contain obligations on the tenant to uphold the buildings, machinery, weirs, and water-courses, except against the effects of ordinary tear and wear.⁵⁵
- Shootings and fishings. The clauses as to repair in shooting and fishing leases refer only to the buildings and (in the latter case) to the boats.⁵⁶

Remedies.

- Inspection. In addition to the ordinary remedies by action⁵⁷ and diligence, it is a general rule, applicable to all cases of repairs where there is no express provision for arbitration, that either party is entitled, on summary application to the sheriff,⁵⁸ to obtain a judicial inspection of the subjects in immediate contemplation of a removing.⁵⁹ If before the stipulated ish a dispute arises as to whether the tenant is entitled to a premature removing, this mode of obtaining and preserving evidence of the state of matters when the subjects are abandoned is none the less competent ;⁶⁰ and the same doctrine would be held to apply to any premature dissolution of the contract—either under express agreement, or according to predetermined breaks. The right to obtain an inspection and further remedy is not barred by receipt of rent or by allowing the tenant to retain possession on tacit relocation.⁶¹

- Transmission of liability. Questions have arisen as to the incidence of liability, where there has been by succession, assignation, diligence, or purchase a change either of landlord or of tenant. Where the change takes place by assignation or purchase, much will depend on the terms expressly stipulated or plainly implied in the transaction. But

⁵² 1 Jurid. Styles, 617, 659.

⁵³ Ibid. 631, 647.

⁵⁴ Ibid. 680.

⁵⁵ Ibid. 689, 693.

⁵⁶ Ibid. 698, 701, 706 ; see Taylor v. Brown, 1800, Hume 308 (ferry-boats).

⁵⁷ See issues in actions of damages, Graham v. Gordon, 1841, 3 D. 479, rev. 2 Rob. Ap. 251 ; Budge v. Balfour, 1852, 14 D. 943.

⁵⁸ Lees' Sheriff Court Styles, 183 ; A. S., 10th July 1839, sect. 88 ; 16 & 17 Vict. c. 80, sect. 10.

⁵⁹ Gordon's Trs. v. Melrose, 1878, 8 M. 906 ; Hall v. M'Gill, 1847, 9 D. 1557.

⁶⁰ Lees v. Marr Type-Founding Co., 1877, 4 R. 1038.

⁶¹ Hall v. M'Gill, *supra*, ⁵⁹. As to *retentio rei* by tenant, see p. 233.

the rule is that the obligation to repair or to keep in repair, whether imposed by the common law or by compact, runs with the lands, and is enforceable by and against the landlord and tenant for the time being ; but that there may be a right of relief on the ground of unfulfilled obligation against the cedent in an assignation, or against the vendor in a sale, or against the personal representatives of a predecessor.⁶² Where the obligation rests on common law, there is no authority and no principle for admitting a right of relief, since the new-comer takes the subject as it stands.⁶³ Even if there be a special obligation, in fortification or displacement of the common law rules, a right of relief will be somewhat strictly construed. Thus, a lease contained an obligation on the landlord to put the buildings and fences in good condition. He sold the land before the obligation was fulfilled, giving to the purchaser at the date of entry a letter binding himself to execute all repairs he was bound to execute and to relieve the purchaser. The latter understood this letter as an obligation to satisfy the tenants. The seller paid a sum of money to the tenants, and got a discharge of his obligation to them. In an action at the instance of the purchaser to compel the seller to put the subjects in repair, it was held that the tenants were the sole creditors in the obligation contained in the lease ; that the letter was only an obligation of relief of the tenants' claims against the purchaser under the lease, and not a new and substantive obligation undertaken to him ; and that the seller was free of all liability.⁶⁴ But while the obligation to repair is thus transmitted with the premises, liability for damages caused through disrepair during the tenure of one landlord will remain with him and his representatives, and not pass to a purchaser or to a successor who does not represent him.⁶⁵

⁶² See the claim admitted, *intra fines inventarii*, by an executor, *Renton v. Renton*, 1851, 14 D. 35 ; and see cases of improvements in next chapter.

⁶³ See *Macdonald v. Johnstone*, 1883,

10 R. 959.

⁶⁴ *Barr v. Cochrane*, 1878, 5 R. 877.

⁶⁵ On the principle of *Macdonald v. Johnstone*, *supra*, ⁶³.

CHAPTER XII.

IMPROVEMENTS AND THE AGRICULTURAL HOLDINGS ACT.

IT has been stated that the word 'improvements' is here used as signifying meliorations beyond mere repairs for preservation ;¹ and only such meliorations as (in contradistinction to fixtures) are not removeable *in specie*.² It is unnecessary in this chapter to keep up the distinction between urban and rural tenements, for the same rules apply to both. But the cases which are referred to in illustration are almost wholly drawn from leases of rural subjects.

Laid on land-
lord.

The expense of improvements ought properly to come out of the landlord's pocket in short and ordinary leases ; and it is a disadvantage to cultivation if the tenant's power to deal with the land is curtailed by outlays which cripple his credit and are very naturally laid out with more regard to his temporary accommodation than to the good of the premises. It has, therefore, been a usual stipulation that the landlord should lay out a certain sum or sums up to a certain limit in improvements, the tenant paying a certain rate of interest, commonly 5 per cent., and arrangements being made for the carriages, for the conduct and supervision of the operation, for vouchers and so forth.³ The interest may be so calculated as to include a sum for repayment of capital during the lease ; but if the landlord borrows the money from the Enclosure Commissioners⁴ or improvement companies⁵ at this *cumulo* rate and takes his tenant bound to pay 'interest at ' the rate exacted by ' these parties, this will be read as meaning the interest charged irrespective of repayment by instalments ; and the usage of the district will not be allowed to interfere

¹ *Supra*, pp. 218, 224.

² See next chapter.

³ 1 Jur. Styles, 577, 593, 600 ; 1 B.C. 65, 73.

⁴ Improvement of Land Act, 1864

(27 & 28 Vict. c. 114) ; 30 & 31 Vict. c. 101, sect. 115 ; 31 & 32 Vict. c. 89, sect. 6.

⁵ 27 & 28 Vict. c. 114, sects. 53, 54.

with this interpretation.⁶ Right to demand payment of the interest is not barred by the mere fact that it was not exacted till after the ish.⁷ The interest or rent-charge payment is added to the rent proper in fixing the annual value in the Valuation Roll.⁸ Sometimes the improvements are made without any claim for interest. These obligations can only be proved in the same way as the constitution of the lease itself.⁹

Another mode of arranging for the making of improvements is by taking the tenant bound to do a definite piece of work, and allowing him a sum for the purpose in lieu of all claim for compensation. The obligation will then be fairly construed in accordance with the intention of parties as shown by its terms. Thus an obligation to build a thrashing-mill was held to extend to supplying it with machinery, which notwithstanding an alleged local custom to the contrary the tenant could not remove at outgoing.¹⁰ And if machinery is to be 'put in' a mill by the tenant, that means erected, not merely placed within it.¹¹ Payment of the stipulated sum though postponed till the ish is exigible even if the improvements, which were to be made in return for it and were to be given over at the ish, are destroyed by a *damnum fatale* or pure accident;¹² and even if the lease be brought to a premature end by the bankruptcy or renunciation of the tenant.¹³ The right to payment is carried as a 'debt' by the tenant's general disposition and settlement, though the time of payment (the ish) be long subsequent to his death.¹⁴

It frequently happens, however, that improvements are executed by, and at the charges of, the tenant, and the questions of main practical importance in this department have been whether he has in consequence any claim to recompense; and, if so, against whom. Now the cardinal rule is that improvements made by a tenant at his own hand are at common law

Sum allowed to tenant.

On tenant.

Compensation.

⁶ Sinclair v. M'Beath, 1868, 7 M. 273 (£4, 10s., not £6, 14s. 1d.).

⁷ Brisbane's Trs. v. Lead, 1828, 7 S. 69.

⁸ Lockhart; Home, 1858, 24 D. 1451, and see Rankine, Landownership, 204.

⁹ Paterson v. E. Fife, 1865, 3 M. 423. See a case where the landlord's liability was implied from the association of 'additions' with 'repairs'; Barclay v. Neilson, 1878, 5 R. 909.

¹⁰ Campbell v. Howden, 1825, 3 S. 569 (N.E. 391). Mr. Hunter expresses doubts of the soundness of this decision—with what appears to be insufficient reason,

ii. 238.

¹¹ Readdie v. Mailler, 1841, 3 D. 488.

¹² D. Hamilton's Trs. v. Fleming, 1870, 9 M. 329 (fire, *supra*, p. 206).

¹³ Pendreigh's Tr. v. Dewar, 1871, 9 M. 1037; Walker's Trs. v. Manson, 1886, 13 R. 1198. In the former case discount at 5 per cent. was allowed, in respect of immediate payment; in the latter refused. Apart from specialties, the refusal seems justified by the fact that the landlord gets the benefit of the improvements prematurely.

¹⁴ Munro v. Munro, 1825, 4 S. 328 (N.E. 332).

presumed to have been undertaken for his own benefit alone and give rise to no claim for recompense against any one.¹⁵ This rule suffers no exception, even when through the premature (even innocent) termination of the lease—as for example where an heir cannot or will not take it up on the death of his ancestor or the tenant becomes bankrupt—the anticipated advantage of the improvements to the tenant have not been fully reaped.¹⁶ It may be regarded as very doubtful whether local usage will be admitted to add a claim for compensation as a term or condition of the lease,¹⁷ at least if the lease be in writing.¹⁸ So that such a claim can only arise out of express stipulation or by statute. It is proposed to examine, *first*, the nature and effect of express clauses securing to tenants compensation for improvements made by them, and, *secondly*, the leading statutory authority for compensation—the Agricultural Holdings (Scotland) Act, 1883, which is mainly devoted to that subject.¹⁹

I. STIPULATIONS FOR TENANTS' IMPROVEMENT COMPENSATION.

1. *The Obligation and Right.*

Although these stipulations are usually contained in agricultural leases and the law has been completely altered by the Agricultural Holdings Act,²⁰ it would be wrong to pass them over entirely, since that Act only applies to a certain class of subjects, and even, as to these subjects, respects in certain cases custom and agreements in leases current at 1st January 1884 and 'fair and reasonable' agreements in new tacks;²¹ but the subject will be discussed with all possible brevity.

The improvements for which compensation can be demanded are only such as were really in contemplation of the parties in

¹⁵ Bankt. 2.9.68; Ersk. 2.6.39.43; 3.1.11; Kames, Equity, 125; B. Pr. 1255; Hodge v. Brown, 1664, M. 2651, 13400; Officer v. Nicolson, 1807, Hume 827. See Whites v. Houston, 1707, M. 15258; Mackay v. Brodie, 1801, Hume 549; Murray v. Bisset, 1805, Hume 818. The case of Baird v. Inglis, 1671, 2 B.S. 562, is not law, whatever may have been the claimant's title.

¹⁶ Scott's Exrs. v. Hepburn, 1876, 3 R. 816, disapproving 1 B.C. 82, B. Pr. 1255, 1 Bell, Leases, 198, 2 Hunter 208; and distinguishing Morton v. Montgomerie, 1822, 1 S. 344 (N.E. 322). The rule was followed in Walker v. Macknight, 1886, 13 R. 599, and obtains still more

clearly if no ish is mentioned—Thomson v. Fowler, 1859, 21 D. 453.

¹⁷ There has been some vacillation in the decisions and *dicta*—M'Intosh v. Ogilvy's Trs., 1806, Hume 822; Officer v. Nicolson, 1807, Hume 827; Gammell v. Andersons, 1836, 15 S. 233; Gordon v. Thomson, 1831, 9 S. 735; and see Mossman v. Brocket, 1810, Hume 850.

¹⁸ Bell v. Lamont, 14th June 1814, F.C. 645, and the very special cases of the Fort Augustus Leases, Hume 546 *seq.*

¹⁹ The Crofters Holdings Act is dealt with in chap. xxiii.

²⁰ *Infra*, p. 241.

²¹ 46 & 47 Vict. c. 62, sect. 5.

making the stipulation.²² Thus while a majority of the Court were of opinion that a landlord, bound to pay for improvements, was liable for the whole value of a new house, not unsuitable to the size of the farm, but larger than the old house which had become ruinous, a minority took the 'very rational view'²³ that suitability for the farm was an irrelevant consideration and that the tenant, who had proceeded in the teeth of protests, was only entitled to recompense as if he had put up a new house of the same size as the old one.²⁴ A long lease contained a clause binding the tenant to uphold the buildings and giving him right to remuneration at the risk for any excess of value over their worth at entry, as estimated by valuers. The tenant when the old buildings became ruinous erected new ones of greater size and some of them different in character. The House of Lords, differing from the Court below, held him entitled to recompense only 'in so far as the houses and biggings on the farm at the date of the tack were improved or others suitable to the farm were built in lieu of the same, and better than the same, at the expiration of the tack, and that he was not entitled to meliorations for houses and biggings built of new except as aforesaid.'²⁵ It was subsequently determined that buildings which came in lieu of similar old houses did not require to be erected on the same site.²⁶ The tenant will not be entitled to compensation if he executes greater improvements than were originally intended unless he can show something more precise and obligatory than that the landlord held out expectations of some allowance for the work.²⁷ A landlord is not entitled to interdict his tenant from pulling down a building erected by the latter, where the purpose is to erect a better one in its place.²⁸

It is consistent with these decisions that the landlord may step in to prevent operations undertaken by way of improvements, or to obtain a restoration of the premises to their former condition, provided he can show an interest,²⁹ such as a greater risk of fire,³⁰ or an obstruction to the light reaching the windows of a neigh-

Landlord's control.

²² See express provision made (and neglected) as to materials of house to be built and compensated for at risk—*Skinner v. L. Saltoun*, 1886, 13 R. 823.

²³ *Per* L. Chan. in *Jollie*, ²⁵, 5 W. and S. 297.

²⁴ *Ducat v. Cs. Aboyne*, 1803, M. 15264.

²⁵ *Jollie v. Graham*, 1827, 6 S. 236, 7 S. 824, var. 5 W. and S. 280.

²⁶ 1834, 12 S. 789, aff. 2 S. and M'L. 24 (they were near it).

²⁷ *Grant v. M'Leod*, 1856, 19 D. 127.

²⁸ *Jopp v. Scorgie*, 1870, 7 Sc.L.R. 398.

²⁹ See also *supra*, Inversion of Possession, p. 214.

³⁰ *Muir v. Wilson*, 1822, 1 S. 406 (N.E. 380).

bouring house belonging to him.³¹ But if during the currency of the lease there be no present interest to interfere, the landlord will be compelled to await its expiry before obtaining redress in the way of restoration or damages, especially if the improvements do not materially alter the condition or character of the premises.³² And the Court will not grant a general interdict against 'any alterations.'³³

Claim
departed from.

It may be shown by evidence from facts and circumstances that the tenant has passed from his claim, as by accepting a feu of the lands,³⁴ or renouncing the lease without reservation.³⁵ So, also, if there be an arbitration or inspection clause, it will in every case be a question of circumstances, whether it is merely directory and executory or a condition precedent to payment of compensation, the neglect of which is fatal to the tenant's claim.

Inspection.

Thus where an inspection was stipulated for immediately on the finishing of each inclosure, and the claim was made after such an interval that no one knew the dates required, the tenant lost his remedy.³⁶ And where a tenant entitled to recompense for improvements from the incoming tenant took no steps to have them ascertained by valuers (as stipulated in his lease), when his son took a new lease of the lands, it was held that no claim survived at the end of the new lease for improvements made under the old.³⁷ But a claim made timeously at the expiry of a lease is not barred by the fact that no valuation had, as stipulated for therein, been made at the commencement, and proof will be allowed.³⁸

Measure.

The measure of the compensation is, as has been already pointed out, the value of the improvements to the landlord or the incoming tenant, not the amount of the outlay or the value

Mode of ascer-
tainment.

for removal.³⁹ The mode of ascertainment and enforcement is usually by arbitration⁴⁰—which is the exclusive method, if predetermined or *ex post facto* agreed on.⁴¹ If the arbiters differ, one of them fixing a value on the improvements and the other desiring evidence from men of skill, the Court of Session or the Sheriff Court will order a devolution to the oversman, though he

³¹ *Ross v. Moncrieff*, 1859, 22 D. 323 (especially looking to the description of the premises in the lease).

³² *Stirling v. Strang*, 1857, 19 D. 568.

³³ *Ibid.*

³⁴ *Selkirk Mags. v. Clapperton*, 1830, 9 S. 9.

³⁵ *Jenkin v. Younger*, 1825, 3 S. 639 (N.E. 447).

³⁶ *Grant v. Baird*, 1810, Hume 855.

³⁷ *Macra v. Mackenzie*, 1828, 6 S. 935.

³⁸ *Fraser v. Fraser*, 1835, 13 S. 988.

³⁹ *Sinclair v. Manson*, 1821, 1 S. Ap. 1; *Frier v. E. Haddington*, 1871, 10 M. 118.

⁴⁰ See *Gammell v. Andersons*, 1836, 15 S. 233 (lying inventory).

⁴¹ *Fraser v. Maitland*, 1824, 2 S. Ap. 37.

has already expressed an opinion on the matter.⁴² Failing arbitration, a summary application may be made for inspection⁴³ unless there have been excessive delay;⁴⁴ or an ordinary action may be brought;⁴⁵ or, where the amount of claim is ascertained in the lease, diligence may be taken on it; but retention of the premises is incompetent.⁴⁶ The rules regarding retention of rent will be discussed hereafter.⁴⁷ The evidence which is alone competent to prove the existence of an obligation of recompense is the same as is required for the constitution of a lease.⁴⁸ The value of the improvements may, of course, be proved *prout de jure*. Interest is allowed from the expiry of the lease, unless otherwise stipulated.⁴⁹ If the lease is reduced the tenant has no claim for meliorations, where they were not made in *bond fide* reliance on the validity of the right.⁵⁰

2. Parties in Right of, or Liable for, Improvements.

The law relating to the powers of certain proprietors who have only a fiduciary or limited right of ownership—such as judicial factors of various kinds,⁵¹ liferenters,⁵² and heirs in possession under strict entails⁵³—to make improvements and charge the estate and subsequent owners does not fall within the scope of this treatise. What follows in this section deals solely with

⁴² *Sinclair v. Fraser*, 1884, 11 R. 1139 (L. Young thought the second arbiter right, and that it was incompetent for the Sheriff Court to order devolution).

⁴³ See *supra*, p. 226, and cases there; *Fraser v. Mackay*, 1833, 11 S. 391.

⁴⁴ *Irvine v. Scott*, 1856, 18 D. 1090 and *Dove Wilson*, Sheriff Court Practice, p. 341; *Baird v. Mount*, 1874, 1 R. 1119 (miscropping).

⁴⁵ Proof in the ordinary way. If on issues, see form, Macf. 222, 238.

⁴⁶ *Bankt.* 2.9.68; B. Pr. 1256; *Campbell v. Gemmill*, 1790, Hume 779; *M'Neil v. Sinclair*, 1807, Hume 834; *Turner v. Turner*, 1811, Hume 554; *Malcolm v. Henderson*, 1815, *ibid.* The case of *Baird v. Inglis*, 1671, 2 B.S. 562, was very special.

⁴⁷ *Infra*, chap. xiii.

⁴⁸ *Barclay v. E. Fife*, 1829, 7 S. 708 (no *rei interventus*); cf. *Paterson v. E. Fife*, 1865, 3 M. 423 (*supra*, p. 112; damages for failure by landlord to make certain improvements); *Barclay v. Neilson*, 1878, 5 R. 909.

⁴⁹ *Barclay v. E. Fife*, 1829, 7 S. 708; *Jollie v. Graham*, 1829, 7 S. 824,

unaffected by the reversal, 5 W. and S. 280.

⁵⁰ *Innes v. D. Gordon*, 1827, 6 S. 279, aff. 4 W. and S. 305; *D. Gordon's Trs. v. Innes*, 1832, 10 S. 616; see *Ly. Cardross v. Hamilton*, 1711, M. 108, 1747 (where there was no obligation to compensate).

⁵¹ See *Thoms, Jud. Factors*, 84, 213, 216, 234, 241, and the provision of the Pupils Protection Act therein referred to.

⁵² Improvement of Land Act, 27 & 28 Vict. c. 114, sects. 8, 49 *seq.*, 78 *seq.*, and cases collected in *Rankine, Landownership*, 967.

⁵³ 1 B.C. 71; B. Pr. 1256, 1766; *Sandf. Entails*, 327; *Montgomery Act*, 10 Geo. III. c. 51, sects. 9-31; *Rutherford Act*, 11 & 12 Vict. c. 36, sects. 13-20; 37 & 38 Vict. c. 61, sects. 3, 7, 8, 9, 11, 14; 45 & 46 Vict. c. 53, sects. 4, 7, 23; annotated in *Rankine, Landownership*; also Improvement of Land Act, *supra*,⁵² sect. 62. The tenant paying the annual rent-charge under this Act is entitled to deduct the amount from the rent unless otherwise arranged, sect. 67.

obligations incurred between landlord and tenant—on the landlord's part, to improve the subjects let, or to allow the tenant a sum towards improving, or to reimburse him for improvements made by him; on the tenant's part, to make certain improvements with or without recompense. There can be no question that if the obligation is good at all,⁵⁴ it must be good against the obligant himself. The only difficulty arises when there has been a transfer either of the ownership or of the tenancy.

A. Landlord's Obligation.

Transmission
against repre-
sentatives.

It seems to be established that on the death of the lessor leaving an unfulfilled obligation contained in the lease or otherwise instructed by competent proof,⁵⁵ the tenant is entitled to have recourse for implement—when the obligation becomes exigible at however remote a period—to any person who represents the obligor.⁵⁶ He may make his choice among the representatives, and the defender is not entitled to object that all parties have not been called;⁵⁷ and none of them are entitled, in anticipation of the expiry of the lease and of the obligation then becoming due, to a declarator against the tenant that another representative is alone liable.⁵⁸ Notwithstanding a contrary opinion expressed by a great lawyer,⁵⁹ it would probably now be held that the primary or ultimate liability would rest on the heir who succeeds to the lands, representing the lessor, and that the personal representatives would have a right of relief against him in the event of their being compelled to implement the obligation.⁶⁰ The reasons for that view are, that the claim is accessory to the real right of the lessee; that the benefit of the improvements enures to the heir who succeeds; that, as will be more clearly shown when treating of singular successors, the obligation is a condition of the lease, and runs with the lands, being 'a matter properly connected with the 'lands, and forming a natural object of the contract of lease.'⁶¹

⁵⁴ Thus a subtenant has no direct claim against the landlord—*Wilson v. Campbell*, 1839, 2 D. 232.

⁵⁵ *e.g.*, Held to be within the bounds of a submission, *Pitcairn v. Drummond*, 1822, 1 S. 431 (N.E. 401), aff. 1 W. and S. 194.

⁵⁶ *Walker v. Masson*, *infra*, ⁵⁸.

⁵⁷ *Cumine v. Bayley*, 1856, 19 D. 97; *British Linen Co. v. L. Reay*, 1850, 12 D. 949.

⁵⁸ *Walker v. Masson*, 1857, 19 D. 1099 (diss. L. Curriehill, who thought that the heir on succeeding to the lands let be-

came alone liable, the personal representatives being discharged).

⁵⁹ L. Braxfield in *Taylor v. Bethune*, 1791, Bell, Oct. Ca. 214.

⁶⁰ Opinions in *Walker v. Masson*, *supra*, ⁵⁸; contrast *Robson v. M'Nish*, 1861, 23 D. 429. See the question discussed in 2 M'Laren, Wills, 482; B. Pr. 1935, 1936; 1 Bell, Conv. 237, 337.

⁶¹ Arg. in *Fraser v. Maitland*, 1824, 2 Sh. Ap. 37, 42; contrast an obligation not *inter naturalia* of the lease, *Waterson v. Stewart*, 1881, 9 R. 155.

If a lessee entitled to compensation at ish for improvements purchases the farm before his lease is out, it would probably be now held, contrary to an old decision,⁶² that his claim was lost by confusion, and that it was considered in fixing the price.⁶³ At all events it seems to be clear that the heir is primarily, if not solely, liable for improvements made by the tenant under stipulation of recompense at ish but not till after the heir's succession to the estate, for he and the tenant have the whole benefit.⁶⁴

Down to the year 1878 the rule of liability was in strong contrast to what has just been stated, where the heir succeeding did not represent his ancestor and held the lands under a strict entail. His succession was freed from liability for expenditure on improvements in two different ways. Except by virtue of statute⁶⁵ the estate and his interest in it could not be charged with outlays on improvements made by his ancestor himself. And (what is more to the purpose here) he was not liable to a tenant for any obligation of his ancestor unfulfilled at the date of his own succession,⁶⁶ either to pay for meliorations executed by the tenant,⁶⁷ or to execute them for the tenant,⁶⁸ or, it is submitted, to pay a sum towards the expense of improvements; unless he homologated or adopted the obligation,⁶⁹ or it rested not on agreement but on custom,⁷⁰ or, perhaps, if the improvements were made after the ancestor's death,⁷¹ or the obligation was an entailor's debt.⁷²

⁶² *Macdoual v. Macdoual*, 1760, M. 15259.

⁶³ See *Selkirk Mags. v. Clapperton*, 1830, 9 S. 9; *L. Blantyre v. Dunn*, 1858, 20 D. 1188.

⁶⁴ See *Ross v. Hawkins*, 1848, 10 D. 1288 (faulty rubric); and obs. of L. Gifford in *Moncreiff v. Skene*, *infra*, ⁶⁷; 1 W. and S. 226, discussed in *Mackenzie v. Mackenzie*, 1849, 11 D. 596.

⁶⁵ The statutes are enumerated *supra*, 53.

⁶⁶ 1 B.C. 74; B. Pr. 1256, 1766; *Sandf. Ent.* 327; *Rankine, Landownership*, 586.

⁶⁷ *Dillon v. Campbell*, 1780, M. 15432; *Webster v. Farquhar*, 1791, M. 15439, *Bell*, Oct. Ca. 207; *Taylor v. Bethune*, 1791, *Bell*, Oct. Ca. 214; *Moncreiff v. Skene*, 1823, 2 S. 113 (N.E. 104), *aff.* 1 W. and S. 217; *Fraser v. Fraser*, 1825, 4 S. 73 (N.E. 76), 5 S. 722, 8 S. 409, *aff.*

5 W. and S. 69; cf. *Campbell v. Dundas*, 20th Feb. 1812, F.C. 515 (price of renunciation of lease); *Fraser v. Mackay*, 1833, 11 S. 391 (part entailed, part not); *Innes v. D. Gordon*, 1831, 9 S. 632 (*res judicata*).

⁶⁸ *Mackenzie v. Mackenzie*, 1849, 11 D. 596; *Runcie v. Lumsden's Reps.*, 1857, 19 D. 965.

⁶⁹ *Jollie v. Graham*, 1824, 2 S. 730 (N.E. 611), 7 S. 824, *aff.* on this point, 5 W. and S. 230; but a mere reference to the claim and acceptance of an assignation which expressly carried it did not prove adoption, *Barclay v. E. Fife*, 1829, 7 S. 708.

⁷⁰ *Semble*—*Learmonth v. Sinclair's Trs.*, 1878, 5 R. 548.

⁷¹ See note ⁶⁴, *supra*, and *Barnfield v. Stewart*, 1872, *Guthrie's Dec.* 283.

⁷² *Fletcher v. Fletcher's Trs.*, 1826, 4 S. 788 (N.E. 795).

D. of Argyll's
Act.

But this unfortunate state of the law was completely altered by the Entail Amendment Act, 1878, known as the Duke of Argyll's Act,⁷³ which by its first section enacts as follows :—

All obligations undertaken, whether prior or subsequent to the passing of this Act, by an institute or heir in possession of an entailed estate in Scotland, in any lease granted by him as proprietor of such estate, or in any agreement with reference to such lease, for the execution by the proprietor, or with reference to the execution by the tenant of any improvements of the description contained in the third section of the Entail Amendment (Scotland) Act, 1875, shall, in case of his death after the passing of this Act, and before complete fulfilment of such obligations, and to the extent to which if he had himself made and paid for said improvements, and had survived till payment is actually made, he would have been entitled to charge them upon the estate (if the estate had been an entailed estate under the said Act) devolve upon the heirs succeeding to the estate after him, who shall in their order be bound to relieve his executors or other personal representatives of such obligations so far as unfulfilled, and to repay to such executors or other personal representatives any sums of money which they may be called upon to pay and may have paid in virtue of such obligations ; provided that this enactment shall not apply to any case in which the granter of the obligation has in express terms, either in the obligation itself or in any separate writing, declared his intention to impose the obligation upon his executors to the relief of the heirs of entail.

Statutory im-
provements.

Heirs of entail are thus put as nearly as the genius of entail law will allow in the position of heirs who represent their ancestor. The improvements enumerated in the recited Act of 1875 include nearly every conceivable permanent improvement.⁷⁴

A real condi-
tion.

It has long been settled that a landlord's obligation to his tenant to improve, or allow a sum towards improvements, or to recompense for improvements, runs with the lands (or more correctly with the reversion) or is a real quality or condition, in the sense that it transmits against singular successors in the lands without special transfer ;⁷⁵ provided it be a term of the lease itself or be imported into it by some custom of the district or

⁷³ 41 & 42 Vict. c. 28.

⁷⁴ 37 & 38 Vict. c. 61, sect. 3. It will be enough in order to show the scope of the section to give the leading words of the subsections—the other words being *ejusdem generis* :—Draining, embanking, enclosing, reclamation, making roads, trenching, clearing, planting, erecting, improving or adding to mansion-house, farm-houses, cottages, factors' houses,

inns, shooting-lodges, engine-houses, jetties.

⁷⁵ *Arbuthnot v. Colquhoun*, 1772, M. 10424, 15220 ; *Fraser v. Maitland*, 1824, 2 Sh. Ap. 37 ; *Stewart v. M'Ra*, 1834, 13 S. 4. The old case *Rae v. Finlayson*, 1680, M. 10211, was decided when, and on the *ratio* that, tacks of burgh tenements were unusual, 1 B.C. 74 ; B. Pr. 1256 ; *More's Notes*, 253.

barony⁷⁶ not inconsistent with the lease,⁷⁷ and by a subsequent agreement not merely latent;⁷⁸ whether the improvements were executed before or after⁷⁹ the singular successor's entry. If made after that date, the tenant cannot retain in security or for payment any rent due by him to the lessor.⁸⁰ If made before that date, both the singular successor and the lessor and his representatives are liable to the tenant, but on the singular successor lies the primary or ultimate liability, enforceable by an action of relief.⁸¹ A special clause burdening a purchaser with meliorations due under *current* leases includes those due under a lease terminating at the Whitsunday of his entry and the separation of the crop.⁸² Neither the tenant nor the contractor who does the work has a claim for more than the obligation, if explicit, warrants, though more is spent, and the landlord was represented at the adjustment of the plans.⁸³

B. *Tenant's Obligation.*

This obligation lies on the lessee and his representatives⁸⁴ (the heir succeeding to the lease being liable *primo loco*),⁸⁵ till it is implemented or transmitted along with the other obligations of the lease to an assignee.⁸⁶ An obligation immediately or in the future prestable by the lessee is transmitted to a purchaser at his entry to the lands.⁸⁷ But of a continuing obligation (such as to lay on so much lime every year during the lease), only that part which effeirs to the period subsequent to the purchaser's entry is enforceable by him, unless his right is extended by a special assignation.⁸⁸

II. IMPROVEMENTS, AS AFFECTED BY THE AGRICULTURAL HOLDINGS (SCOTLAND) ACT, 1883.

This extremely important statute,⁸⁹ which passed at the same

⁷⁶ *M'Intosh v. Ogilvie's Trs.*, 1806, Hume 822; *Officer v. Nicolson*, 1807, Hume 827; *Gammell v. Andersons*, 1836, 15 S. 233; *Bell v. Lamont*, 14th June 1814, F.C. 645; and *Fort Augustus Cases*, Hume 546 *seq.* See these cases referred to *supra*, p. 230.

⁷⁷ *Gordon v. Thomson*, 1831, 9 S. 735; see *Gordon v. Robertson*, 1826, 2 W. and S. 115; and *Alexander v. Gillon*, 1847, 9 D. 524.

⁷⁸ *Bruce v. M'Leod*, 1822, 1 Sh. Ap. 213; *Turner v. Nicolson*, 1836, 13 S. 633.

⁷⁹ *Morrison v. Patullo*, 1787, M. 10425; 1 B.C. 74; *Brodie's Stair*, 371.

⁸⁰ *Ibid.*

⁸¹ *Arbuthnot v. Colquhoun*, *supra*, ⁷⁵.

⁸² *Stewart v. E. Dunmore's Trs.*, 1837, 15 S. 1059.

⁸³ *Turnbull v. M'Dowall*, 1812, Hume 858.

⁸⁴ On the principle of *Bethune v. Morgan*, 1874, 2 R. 186.

⁸⁵ See 1 M'Laren, Wills, 482.

⁸⁶ See *supra*, p. 178. As to sublessees, see *supra*, p. 180.

⁸⁷ *Hall v. M'Gill*, 1847, 9 D. 1557 (the rule did not need the specialty of tacit relocation on the same terms.

⁸⁸ *Hamilton v. Fleming*, 1793, Hume 787.

⁸⁹ 46 & 47 Vict. c. 62.

time as a similar English Act,⁹⁰ is chiefly occupied with compensation for tenant's improvements, and has, within its scope, wrought a revolution in the law. The Act has received little authoritative interpretation; nor, looking to the comprehensiveness of the provision barring appeal from the sheriff's decision regarding awards (sect. 20), is it likely that many cases under the Act will reach the Court of Session. It has, therefore, been regarded as expedient to print the Statute in the Appendix in an unannotated form; to incorporate a copious index in the general index at the close of this volume; and to attempt in this place merely an analysis of the Act, containing only such criticisms or suggestions towards an interpretation as seem to be absolutely necessary.⁹¹ Useful collections of forms are contained in both of the monographs cited below; and the latter of the two embraces much interesting matter in regard to the period of exhaustion of certain fertilisers. It is thought to be inexpedient to overload this volume with either of these aids; since the forms are in every case obvious or at least simple, and since there is the greatest possible diversity of opinion in regard to exhaustion, and so much depends on the nature of the soil.⁹²

Purpose of the Act.

The Statute passed on 25th August 1883 and came into force on 1st January 1884 (the commencement of the Act, sect. 34). The known, though in the Act itself undeclared, purpose of the legislature was to be fair to tenants, and to increase and keep at a high level the fertility and productiveness of the land. The mischief sought to be remedied was that a tenant in an agricultural lease, knowing that he had at common law no security for his improvements, and having been unable to obtain any security for them in his lease, took all he could out of the land in the last few years of his lease, and let it down to such an extent

⁹⁰ The differences between the two Acts are numerous.

⁹¹ An able and acute annotation, along with a short analysis, a guide to the requirements of the Act, and a good set of forms has been published by Mr. C. N. Johnstone, advocate. Mr. David Philip, S.S.C., prints the Act with notes, and—what is less useful and may mislead—extracts from the debates during the passage of the Bill through Parliament. There are many English treatises, such as Lely and Pearce-Edgcombe (2nd ed.); Willis-Bund (3rd ed.); Brooke-Little; Jeurwine; Hutchins; but there is little judicial comment.

⁹² The legislature ventured on no rules of exhaustion in either of the Acts of 1883; and the Duke of Richmond's permissive Act (38 & 39 Vict. c. 92, sects. 5, 6), which was repealed by the English Act above and never applied to Scotland, only distinguished improvements in a shorthand and inadequate way into those exhausting in twenty years (draining and other material works), seven years (liming and the like), and two years (purchased manure, feeding stuffs). Forms of leases and estate regulations, drawn in contemplation of the Act, are to be found in the Appendix hereto, No. xiii.

that his successor could not get it in heart again for several years after his entry, so that, during only about one-half of the currency of a nineteen years' lease, was the land in its normal state; and that all this could be done without such transgression of the rules of good husbandry, as could be checked by the landlord or lead to a penalty being incurred. The remedy adopted in the Act was in effect to enforce payment in the way of compensation at outgoing for what the tenant had done beyond ordinary husbandry, in certain specified ways, with the result of adding to the value of the holding. The other and minor provisions of the Act are noticed elsewhere.⁹³ It is proposed to explain,—*first*, the general scope of the Act in regard to—(1) the subjects to which it applies; (2) the persons it affects; and (3) the rights it interferes with: and, *secondly*, the provisions with regard to compensation for improvements.

1. *Subjects of the Act.*

The subjects to which the Act applies are holdings (*i.e.*, pieces of land held by a tenant, sect. 42), (a) wholly agricultural; or (b) wholly pastoral; or (c) in part agricultural and as to the residue pastoral;⁹⁴ or (d) in whole or in part cultivated as a market-garden; provided that they be *not* let to the tenant during his continuance in any office, appointment, or employment of the landlord (sect. 34), and provided that they be held under a lease (*i.e.*, a letting of or agreement for the letting land) for a term of years, or for lives, or for lives and years, or from year to year (sect. 42).

Subjects of the Act.

2. *Persons affected.*

The persons affected are landlords and tenants. A landlord is a person—the word includes a body of persons and a corporation—for the time being entitled to receive the rents and profits of or to take possession of any holding (sect. 42). A lessee is therefore a landlord under this Act with reference to his sublessee.⁹⁵ He may be either an absolute owner—*i.e.*, capable of disposing of the fee-simple, or *dominium utile* of the whole interest of or in land, though the land or his interest therein be burdened, charged, or encumbered (sect. 42), or he may not be an absolute owner. In the latter case he has the powers of an absolute owner in giving consents, making arrangements, and doing and having done to him any acts in relation to improvements in

Persons affected.

⁹³ Bequest of lease, *supra*, p. 150; fixtures, *infra*, chap. xiii.; notice of termination, chap. xxi.; irritancies, chap. xx.

⁹⁴ Not a hotel with 28 acres appurtenant, *Mackintosh v. L. Lovat*, 1886, 24 Sc.L.R. 202.

⁹⁵ If subtenancies were more frequent in agricultural holdings, many puzzling questions might arise under sects. 4 and the procedure clauses. Special provision is made for charging the intermediate lease with improvement debt (sect. 24, *infra*).

respect of which compensation is payable under the Act (sect. 33). Crown lands are, for the purposes of the Act, administered by the Commissioners of Woods and Forests or other proper officer, or by a special representative of Her Majesty appointed in writing under the sign manual. A provision is made for payment of compensation out of the Land Revenues of the Crown (sect. 31).⁹⁶ Parish ministers cannot exercise their powers as landlords without the previous approval in writing of their presbytery. Trustees for ecclesiastical, educational, or charitable purposes must first obtain the approval of a Secretary of State (sect. 32).⁹⁷ 'Tenant' means the holder of land under a lease (sect. 42). 'Landlord' or 'tenant' includes the executors,⁹⁸ administrators, assignees, legatee, disponent, or next-of-kin, husband, guardian, curator *bonis*, or trustees in bankruptcy of a 'landlord' or 'tenant' (sect. 42); and these designations (landlord and tenant) continue to apply to the parties until the conclusion of proceedings taken under the Act in respect of compensation for improvements (*ibid.*).

3. *Rights interfered with.*

Rights interfered with.

The mode in which the Act interferes with freedom of contract and existing rights is set forth in sects. 40, 38, and 36. There is a general saving of rights, 'except as in this Act expressed,' so as not to take away, abridge, or prejudicially affect any power, right, or remedy exerciseable under Act, law, or custom (sect. 40). A tenant shall not be entitled to claim compensation by custom, or otherwise than in manner authorised by this Act, in respect of any improvement for which he is entitled to compensation under this Act; but where he is not so entitled he may recover compensation under any agreement or custom in the same manner as if the Act had not passed (sect. 38)—*i.e.*, where the agreement or custom goes beyond the scope of the Act. Any contract or agreement made by a tenant, by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement (except an agreement providing for such compensation as is by this Act permitted to be substituted for compensation under this Act), shall, so far as it deprives him of such right, be void (sect. 36). The view taken by annotators⁹⁹ of the English statute, that an agreement

⁹⁶ 29 & 30 Vict. c. 62.

⁹⁷ This Act is not scheduled in the Secretary for Scotland Act, 1885 (48 & 49 Vict. c. 61).

⁹⁸ Not their heir! The words are quoted from the definition of 'tenant' in

the English Act—hence the blunder.

⁹⁹ Woodfall, p. 778; Lely and Pearce-Edgcumbe, pp. 35, 133; Little, 140; *contra* Johnstone, *apud* sect. 3; Jeurwine, 42. It is the old difficulty about rent, elusory rent, and no rent, *supra*, pp. 101, 129.

not to make any improvements, or dispensing with compensation altogether could not be effectually substituted, seems to be justified by the terms of this section. These two last sections contain the only provisions which compel a resort to the Act. Consequently, in all leases entered into subsequently to the passing of the Act, parties were and are at liberty *ab initio* to oust its operation in any particular, with this sole proviso, that in regard to compensation the only mode of contracting out of the Act is to agree on a substituted compensation such as the Act contemplates. On the other hand, leases entered into before the passing of the Act are necessarily affected by it, and it can only be ousted by agreement between the parties made in full contemplation of their novel rights and liabilities.

4. *Compensation for Improvements under the Act.*

It is the wise policy of the Act to confine the new statutory right to compensation to certain specified classes of improvements, instead of starting with a comparison of the value of a farm at entry and exit, and then attempting to discriminate between that part of any increment for which the tenant and that part for which the landlord is entitled to take credit. It may be doubted whether this policy is made any clearer by the proviso in the leading section of the Act that the tenant is not entitled to compensation for any improvement which 'is justly due to the inherent capabilities of the soil'¹⁰⁰ (sect. 1). The improvements to which the statute applies are contained in a schedule, and are divided into three parts. Part I. includes improvements which agree in this that they are of a permanent character, altering the character of the holding, making structural, or at least functional, changes on the surface, and that they ought naturally to be executed by the landlord himself. They may be called 'landlords' improvements.'¹⁰¹ The operations enumerated are—erection or enlargement of building; formation of silos; laying down of permanent pasture; making of water-meadows or works of irrigation; making of gardens; making or improving of roads or bridges; making or improving of water-courses, ponds, wells, or reservoirs, or of works for supply of water for agricultural or domestic purposes; making of permanent fences; and reclamation of waste land; weiring or embanking of land, and sluices against floods. Part II. includes drainage only—an operation often necessary to good cultivation, yet not of an ordinary

Scheduled improvements.

Landlords' improvements.

Drainage.

¹⁰⁰ The phrase is taken from Butt, Irish Land Act, 128; see *Adams v. Dunseath*, 10 L.R. (Ir.) 109, 119, *per* Law C.

¹⁰¹ The term 'permanent improvements' is already claimed by the *Entail Acts* with a different signification.

Tenants' improvements.

character, and not as a rule required more than once in the course of a lease.¹⁰² Part III. contains a list of operations (in the way of manuring) which are of ordinary occurrence in the management of a farm, are under the tenant's sole control, and yet may have beneficial effects on the farm, not fully exhausted at the expiration of a lease. They may be called 'tenants' improvements,' in contradistinction to the 'landlords' improvements' in Part I. They are: boning of land with undissolved bones; claying of land or spreading blaes upon land; liming of land; marling of land; application to land of purchased artificial or other purchased manure; consumption on the holding by cattle, sheep, or pigs of cake or other feeding stuff not produced on the holding.

The rule of compensation.

The scheme of the statute is to start with the statement of a general principle or rule, subversive of the common law, and then proceeding to enact certain exceptions or qualifications. The general rule is to be found in the first section, which enacts that a tenant who has made on his holding any of the above improvements shall from and after 1st January 1884 be entitled on quitting his holding at the determination of a tenancy (*i.e.*, the termination of a lease by reason of the effluxion of time or from any other cause, sect. 42) to obtain from the landlord, as compensation under this Act for such improvement, such sum as fairly represents the value of the improvement to an incoming tenant; under the proviso, above referred to, barring claim for what is due to the inherent capabilities of the soil (sect. 1). The time when claim can be made—the quitting of the holding—and the amount claimable required further explanation in two cases, which are treated of in the thirty-ninth and thirty-seventh sections. If the tenant has remained in his holding during a change or changes of tenancy, he is not on quitting to be deprived of his right to compensation by reason only that the improvements were made during a former and not during the last tenancy (sect. 39). And, where an incoming tenant has, with the landlord's written consent, paid an outgoing tenant any compensation payable under or in pursuance of the Act, the incomer shall be entitled, on quitting, to compensation, in like manner (if at all) as the outgoer would have been entitled if he had remained in the tenancy and quitted at the time when the incomer quitted (sect. 37).

So far the rules are of general application. When the qualifications are reached it is necessary to discriminate in more than one direction.

¹⁰² See a statutory description of the processes in 10 & 11 Vict. c. 113, sect. 1.

(1) The first modification of the general rule entitling a tenant to compensation for improvements occurs, when they were executed before 1st January 1884, the date of the commencement of the Act. As to these he is only entitled to compensation, (1) if they are 'tenants' improvements' (Part III. of schedule) executed within ten years before that date, under no express obligation, and as to which compensation is not due by contract or custom; and (2) if he has executed 'landlords' improvements (Part I.) or drainage within that period, without right to compensation under contract or custom, and the landlord before 1st January 1885 has declared in writing his consent to the making of the improvement (sect. 2); thus in the latter case giving the landlord a handy mode of agreeing to a recompense and getting over any difficulty that might arise between a limited owner and his successors. In either case compensation can be claimed in the same manner as if the Act had been in force at the time of the execution of the improvements (sect. 2).

Improvements
executed be-
fore 1st Janu-
ary 1884.

(2) A number of modifications come into play in regard to all the scheduled improvements, when these have been executed after 1st January 1884. (a) In the case of 'landlords' improvements' (whether the lease were current at the passing of the Act or not), nothing is due to the tenant unless the landlord or his agent duly authorised on that behalf has, previously to the execution of the improvements, and after the passing of the Act, consented in writing to their execution, either unconditionally or upon such terms as to compensation or otherwise as may be agreed on, the compensation payable under such agreement being 'deemed to be substituted for compensation under this Act' (sect. 3). Thus the consent of the landlord to the execution of 'landlords' improvements' which at common law, whether given expressly or gathered from a failure to veto, involved no liability for compensation, now, if expressly given involves such liability, unless guarded by conditions. It is deemed to be the result of a collation of this section and section thirty-six that a condition importing a total denial of compensation would be void. But there is no provision that the stipulated compensation should be 'fair and reasonable.'

Executed
thereafter (a)
Landlords' im-
provements.

(b) In the case of drainage executed after 1st January 1884, (b) Drainage. no compensation is due unless the tenant (notice not having been dispensed with) give to the landlord or his duly authorised agent, not more than three nor less than two months before beginning the work, notice in writing of his intention so to do, and the manner of it. One of three things may then happen. (1) The

parties may agree that the tenant shall do the work, on terms as to compensation or otherwise (this compensation being then deemed to be substituted for compensation under the Act). Or (2), The landlord may undertake to execute the work, and, unless the notice is previously withdrawn, proceed to do so 'in any reasonable and proper manner which he thinks fit,' charging the tenant not more than five per cent. on the outlay, or not exceeding such annual sum payable for twenty-five years as will repay the outlay in that period, with interest at three per cent. ; such annual sums being recoverable as rent. Or (3), The parties may fail to agree, or the landlord may fail to comply with his undertaking within a reasonable time, and then the tenant may execute the improvements himself, and shall in respect thereof be entitled to compensation under the Act. But, if a lease current on 25th August 1883 (which on analogy of entail law may be called an *old lease*),¹⁰³ or a relative writing dated before that day limits outlay for drainage, the limit holds with regard to this compensation (sect. 4). It is a serious defect of this section that there is no provision for the ordinary case in which landlord and tenant share the work. It will be the safest course, if the second mode be adopted, for the tenant to make a reasonable charge for carriages and servants' wages against the landlord as part of the outlay. The liability for payment of the interest or terminable annuity ceases, of course, with the lease, or at furthest with the tenancy. Unless an agreement be come to in the first mode, there is nothing to compel the tenant to carry out his project. If he does not commence operations within three months of his notice, and the delay does not result from the landlord's failing to comply with his undertaking, the proper course will be for the tenant to issue a fresh notice.

Old lease.

Substituted compensation.

(3) The third modification or qualification of the general rule entitling a tenant to compensation under the Act admits arrangements for substituted compensation. (a) Where in tenancies under *old* leases an agreement in writing or a custom provides 'specific compensation' for any of the scheduled improvements, compensation is payable in pursuance thereof, and is deemed to be substituted for compensation under the Act. And (b) where (1) in tenancies under *new* leases, or (2) in tenancies under *old* leases, as to any 'tenants' improvement' not provided for by agreement or custom as aforesaid, 'any particular agreement in writing secures to the tenant for any tenant's improvement

¹⁰³ See the provision for the change of an old to a new lease, where the tenancy is from year to year, by notice on either side (sect. 42).

'executed after 1st January 1884, fair and reasonable compensation, having regard to the circumstances existing at the time of making such agreement, the compensation in respect of such improvement shall be payable in pursuance of the particular agreement and not of this Act' (sect. 5). It thus appears that in new leases a custom of compensation will be no longer proveable; while in old leases it will be still relevant if it infers 'specific compensation' (probably meaning compensation for specific improvements, not for general melioration). Further, an agreement (no matter of what date), relating to any scheduled improvement by parties to an old lease ousts, so far as it goes, the statutory compensation if it be 'specific'; while under new leases, and, so far as it is not so ousted, under old leases, an agreement concerning compensation for 'tenants' improvements must be 'fair and reasonable.' It would be unsafe to attempt any illustration of this phrase. The 'scales' of compensation framed by district chambers of agriculture and farmers' clubs differ widely. It is probable that the administrators of the law here enacted would be entitled and bound to regard as fair and reasonable an agreement based, with no more than immaterial modifications such as betray individual discretion rather than undue influence, on any of these scales. The agreement must, besides being fair and reasonable, be 'particular,' by which is probably meant 'articulate,' or 'entering into particulars'; and the form usually recommended for adoption is by schedule applicable to each of the 'tenants' improvements' as to which it is intended to oust the statute, and detailing the rate and period of exhaustion, or the remanent value (in shillings per pound of the actual cost) as manure in each year of that period. The parties may thus contract themselves out of the Act either in the lease itself or by subsequent particular agreement. In either case they should express their intention to oust the statute, though this is not necessary so long as they have actually and effectually done so.

(4) The last qualification or modification of the tenant's right Reductions. to compensation consists of certain reductions and deductions. The compensation is *reduced* by (a) any benefit given or allowed to him in consideration of his executing the improvements; and (b) in compensating for manure, by the value of the manure which would have been produced by the consumption, according to the rules of good husbandry or written contract specifying such rules, of crops sold off or removed during the last two years of the tenancy (or other less time it has endured except in so far as

Deductions. a proper return of manure has been made. The *deductions* are sums due to the landlord for (a) rent; (b) taxes, rates, public burdens, drainage moneys, and insurance premiums; (c) breach of stipulation in the lease or any relative contract; (d) deterioration committed or permitted by the tenant, provided, as to deterioration and breach of stipulation in relation to cultivation and management, that they have occurred within four years before the determination of the tenancy. But there shall be added to the compensation any sum due for compensation in respect of breach by the landlord of stipulations in the lease or any relative contracts (sect. 6). The Act gives only additional remedies, and does not supersede action at law or other competent process.¹⁰⁴ The opinion may be hazarded that a tacit diminution of rent in respect of improvements being undertaken in the lease by the tenant and executed after 1st January 1884¹⁰⁵ would not be regarded as a 'benefit' to him in the sense of this section.¹⁰⁶

Such being the substantive part of this important statute, it only remains to notice more briefly the procedure adopted in order to carry out these provisions. This procedure relates, *first*, to the ascertainment of the compensation, and *second*, to the mode of charging compensation money on the estate.

1. *Procedure for ascertaining Amount of Compensation due.*

By reference. A tenant is not to be entitled to compensation¹⁰⁷ under the Act unless¹⁰⁸ he four months at least before the determination¹⁰⁹ of the tenancy¹¹⁰ give written notice to the landlord of his intention to claim. The landlord may then give a counter-notice of claim for compensation¹¹¹ at any time within fourteen days after

¹⁰⁴ These counter-claims can do no more than diminish or extinguish the tenant's right; they cannot be awarded in excess; see *Soot's Trs. v. L. Wharnccliffe*, 1885, 1 Sh. Ct. Rep. 189.

¹⁰⁵ There is no compensation for those executed earlier (sect. 2). See as to mis-cropping, *Hunter v. Barron's Trs.*, 1886, 3 Sh. Ct. Rep. 33.

¹⁰⁶ *Johnstone, in loco, contra.*

¹⁰⁷ Does a renunciation silent regarding claims under the Act exclude them? *Stuart v. Strang*, 16th March 1887.

¹⁰⁸ The negative form makes this an essential condition. The point is not so clear in the English Act.

¹⁰⁹ Which the practice of the parties may interpret as meaning an old term, not the legal term—*Hunter v. Barron's*

Trs., 1886, 13 R. 833.

¹¹⁰ Defined, *supra*, p. 242. Therefore, where a sudden termination is possible or probable, notice should be given immediately on outlay, *e.g.* in tenancies for life, or where an irritancy is impending. See *Osler v. Ms. Lansdowne*, *infra*, ¹¹⁴. A Whitsunday and separation lease determines at Whitsunday, though there is a privilege of partial occupation beyond that term—see *Hannan v. Ramsay*, 1885, 1 Sh. Ct. Rep. 232, 292. Where the ish is Martinmas as to arable, and the following Whitsunday as to houses and grass, notice is timeous if made four months before the Whitsunday—*Stuart*, ¹⁰⁷.

¹¹¹ Under sect. 6, top of this page. The term 'compensation' is an unfortunate

said determination (sect. 7). Failing agreement as to the amount, mode, and time of payment, a reference is ordered (sect. 8) to a single referee or to two referees and an oversman (sects. 9, 10). Careful provisions are made for filling up vacancies caused by death, disability or failure to act (sect. 9). The delivery to a referee of his appointment is to be deemed a submission by the party delivering it. Neither party can revoke a submission or appointment without the consent of the other (sect. 11). The referee or referees or oversman may require production of documents, &c., in the power of either party, and examine on oath (sect. 12), and, after notice, proceed in absence of either party (sect. 13). The award must be in writing and signed.¹¹² If issued by a single referee, it must be pronounced and ready for delivery within twenty-eight days after his appointment; if by two referees, within twenty-eight days after the last appointment, or within an extended time, fixed by them from time to time jointly and not exceeding forty-nine days from said last appointment; if by an oversman, within twenty-eight days or time extended, not beyond forty-nine days in all, after notice given him in writing of the devolution to him (sect. 16). The award shall not find a sum due generally, but shall as far as reasonably may be specify (a) the improvements compensated, with the matters taken into account in reduction or augmentation; (b) the time of execution, commission, permission, or omission; (c) the sum awarded for each improvement, act, matter, or thing; and (d) if the landlord is to charge his estate (under sect. 24, *infra*) the date of exhaustion of each improvement (sect. 17). The award may decern for expenses (a wide discretion being bestowed on the referees and oversman), subject to taxation (sect. 18), and it shall fix a day not sooner than a month after it is delivered for the payment of the money awarded for compensation, expenses, or otherwise (sect. 19).

The sheriff (including sheriff-substitute (sect. 42) — there being no appeal from the latter to his principal¹¹³) has, for his duty (a) to appoint a referee where after notice one party has failed to appoint one;¹¹⁴ (b) similarly to appoint an oversman on

Sheriff's functions.

one, but there seems to be no mode of distinguishing between liquid claims (as for taxes, rents, &c.) and illiquid claims for damages (deterioration, breach of lease). All must be counter-claimed if they are to affect the award.

¹¹² And stamped with *ad valorem* stamp — 33 & 34 Vict. c. 97, sched. *voce* Award; not a mere Appraisement stamp, which is

enough when there is only a determination of value of certain goods or repairs, *Leeds v. Burrows*, 12 East 1. The award is after-stampable, *ibid.* sect. 57.

¹¹³ See *Gillespie's Hosp. v. Penman*, 1885, 1 Sh. Ct. Rep. 292.

¹¹⁴ See *Osler v. Ms. Lansdowne*, 1884, 1 Sh. Court Rep. 48; *Barron's Trs. v. Hunter*, 1885, *ibid.* 221.

the failure of the referees to do so (sect. 9); (c) to appoint an oversman, if either party on appointing a referee notifies a requisition to that effect (sect. 10); (d) to extend if he thinks fit the oversman's time for making award (sect. 16);¹¹⁵ (e) to appoint, and renew the appointment of, guardians to landlords and tenants who are under disability (sect. 22). But his most important function is to hear and determine appeals, where the sum claimed as compensation exceeds £100 on all or any of the following grounds:—(1) Invalidity of the award;¹¹⁶ (2) improper application therein of the special provisions of sects. 3, 4, or 5, or omission properly to apply the same; (3) no title in a party to claim certain compensation; or (4) no compensation awarded to a party entitled.¹¹⁷ He may in his discretion remit for a rehearing with directions. His judgment is final;¹¹⁸ and the award is final if no appeal be taken to him within seven days of its delivery (sect. 20). Money agreed on or awarded or on appeal ordered to be paid may, if not paid within a month of the term of payment, be recovered by recording the agreement or award in the Sheriff Court books, like a bond or decree arbitral, or by enforcing the sheriff's order like an ordinary decree (sect. 21).

Substituted
compensation.

So far the procedure applies only to the ascertainment of compensation money 'under the Act.' But the substituted compensation of sects. 3, 4, and 5 must also be ascertained in this way, provided (1) there be a reference under the Act going on as to some other improvements; and (2) such a course be not inconsistent with the agreement for substitution. The award ought to distinguish these improvements and the amount awarded for them from the rest, and the above rules as to appeal apply to both sorts (sect. 16, last clause).¹¹⁹

2. *Procedure for charging Compensation Money.*

In limited
ownership.

This procedure is binding, of course, only on limited owners. The sheriff may grant authority to charge money paid for compensation under the Act, substituted compensation and improvements executed by the landlord himself instead of by the tenant on the holding or the estate of which it is a part by the execution and registration of a bond and disposition in security over it, or, if the landlord has only a leasehold interest, of a bond and

¹¹⁵ In administering sects. 9 and 16 he need not be within his county.

¹¹⁶ Being unwritten or unsigned (sect. 14); disconform to sects. 17, 18, 19; or bad at common law (see Bell, *Arbitration*, pp. 34, 327).

¹¹⁷ See Gillespie's *Hosp.*, *supra*, ¹¹³.

¹¹⁸ Expenses to be regulated by Act of Sederunt (sect. 23).

¹¹⁹ This clause should have been, as in the English Act, a separate section. It is nearly unintelligible. The words 'if any' and 'when necessary' have gone astray, and may safely be ignored.

assignation of the lease in security and for repayment. If the landlord be not an absolute owner, the interest and instalments of capital shall not be made payable beyond the time when the improvements, compensated and awarded for, have, according to the declaration in the award¹²⁰ or, failing award, according to the sheriff's judgment, become exhausted. The bond must in that case specify the dates at which the total amount and each instalment are payable. This charge ranks after all prior heritable securities; is no contravention of an entail; and may (in so far as applicable to landlords' improvements and drainage) be diminished or wiped off by means of the price¹²¹ of land entailed on the same line of heirs as the improved holding (sect. 24). Improvement of Land Companies may advance money on and may assign such bonds and dispositions in security or such assignations (sect. 25). The charge affects the holding or estate for the landlord's interest and all subsequent interests, or, where his right is leasehold, the interest of himself, his executors, administrators, and assignees (sect. 26). The instalments and interest of the charge are taken in favour of these same parties (sect. 24), the mode being to take the bond in these terms and assign it to the company or others.

It will be convenient, in conclusion, to notice a few points to which attention has not been specially directed in the foregoing sketch. There is no restriction as to the size of the holdings to which the Act applies (sect. 35). It has no concern with leases-at-will, or leases for less than a year (sect. 43). It gives no rights directly to a 'sitting' tenant, though indirectly it puts him in a stronger position in bargaining for a new lease, and it keeps up his right to compensation under the old, during the currency of the new, lease (sects. 1 and 39).¹²² The Act does not abrogate any rights to compensation, existing or to exist under agreement or custom, with regard to improvements not included in the schedule (sect. 1). The measure of compensation is the 'value of the improvement to an incoming tenant' (sect. 1) whether one can be got or not,¹²³ and it may be necessary to contemplate the improved portion of a holding as apart from the non-paying remainder and inquire what proportion of the profits is then due to the improvement. The procedure laid down is exclusive, with regard to claims founded on the statute (sect. 8) and, in certain

¹²⁰ Sect. 17.

¹²¹ See Rankine, *Landownership*, 579
et seq.

¹²² There is no analogue to sect. 43 of

the English Act.

¹²³ See the English case on custom of country, *Faviell v. Gaskoin*, 7 Ex. 273.

cases with regard to substituted claims, subject to the exception perhaps of necessity for the initial notice (sect. 16, *ad fin.*).¹²⁴ There is unfortunately for the law and, in the long run, for the parties, no provision as in the English Act contained, for appeal from the inferior Court on questions of law by special case.¹²⁵ And litigants who have had to follow the procedure laid down by the Act have in many cases found the expense to be quite exorbitant.

¹²⁴ See Johnstone, *in loc.*

¹²⁵ English Act, sect. 23, *ad fin.*

CHAPTER XIII.

LANDLORD'S FURNISHINGS : FIXTURES.

IN conformity either with the common law obligation to deliver Nomenclature. over to the tenant the subject let in a state fit for the purpose for which it was let, or with express obligation in supplement, the landlord is in many cases bound to provide along with the Landlords' furnishings. bare premises (buildings, farm with buildings, &c.), certain usual or stipulated fittings or appurtenances. If these are and remain moveable, they may be classed under the most general designation as '*furnishings*', including furniture of houses, fittings of shops, machinery in mines and factories, steelbow in farms. If, being Landlords' fixtures (in narrower sense). originally definite moveable objects, they have, either at the inception or during the currency of the lease, been affixed to or infixed into the premises, they are known as '*landlords' fixtures*' in the narrower sense of the term. In each case the furnishings (with an exception in the case of steelbow) remain the property of the landlord. On the other hand, if the tenant provides and stocks or furnishes the premises with articles, animate or inanimate (known as *plenishing*), which are and Tenants' plenishing. remain moveable, these continue to be his property, subject to certain rights of attachment by the landlord which will be considered on a later page.¹ If, on the contrary, he affixes or infixes to or into the premises let definite moveable objects, the legal effect may be that he is not entitled to remove them at the expiry of the lease, but must leave them with the landlord without indemnity. They are then included in the term '*landlords' fixtures*' in the wider sense of the word. Other objects annexed Landlords' fixtures (in wider sense). to the premises by the tenant he is entitled to sever and remove Tenants' fixtures. under certain conditions. These are known as '*tenants' fixtures*.' It would be out of place to advert further in this place to tenants' moveables or plenishing : so that this chapter is devoted

¹ Chap. xvi.

to the two remaining subjects : (1) landlords' furnishings and (2) fixtures.

I. LANDLORDS' FURNISHINGS.

When not only heritable property, but along with it property which is, at the date of the contract or of delivery, and is intended to remain, moveable, is delivered over to a tenant, the contract is logically divisible into two parts: (1) an ordinary contract of lease as regards the heritable property, and (2) as regards the moveable property, either a letting to hire, if it is at ish to be returned *in specie*, or a loan of the nature of *mutuum*, where the *ipsa corpora* cannot, or are not intended to, be returned at ish, but an equivalent delivered over instead. Of a contract of lease and hire the ordinary subjects are furnished houses, shops containing loose fittings, mines and factories with moveable machinery, and bowing of cows. Of a contract of lease and loan the only example is a steelbow farm. The matter is still further complicated where, in a contract of lease and hire, there is hire not only of corporeal moveables, but also of services. This is the case of lodgings and of factories with machinery and steam-supply. In dealing with these complex subjects, the law directs, *first*, that the general rules of location (letting to hire) or loan shall apply, but *second*, that the special rules which govern that sort of location which is called lease shall in some cases dominate over the more general principles applicable to all location.

1. *Furnished Dwelling-Houses.*

It is a proof of the good understanding of parties or of the triviality of the subject-matter of their disputes, that no case can be cited as reported in the Court of Session in illustration of the law of furnished houses. It has been suggested on an earlier page² that leases of furnished houses are not assignable, and that the tenant is not entitled to sublet. As to taxation, 'it is 'notorious that throughout the country there is a very general, if 'not universal, understanding that the landlord of a furnished 'house is liable for all taxes [and rates] exigible in respect of his 'tenant's occupancy of the premises, unless there is a special 'stipulation to the contrary.'³ This rule would apply still more clearly where the hiring was only occasional—a licence to use the premises for a meeting or meetings.⁴ There is seldom a formal lease. Usually the contract rests on missives, or is made by

² *Supra*, p. 160.

³ *Macome v. Dickson*, 1868, 6 M. 898.
(Not gas rate, which is a price depending

on amount of consumption.)

⁴ See *Aitken v. Harper*, 1865, 4 M. 36.

Lease and hire
of things.

Lease and loan.

Lease and hire
of things and
of services.

Leases not
transmissible.

Incidence of
public burdens.

word of mouth. In either case, it is a wise precaution to adjust an inventory of the furniture, minutely detailing such blemishes as might have been occasioned by negligent or hard usage. Since there is, *ex hypothesi*, little, if any, furniture belonging to the tenant to sequestrate, the rent should be payable in advance at intervals agreed on (subject to remission or abatement in case of fire). In the event of failure to pay rent within a certain period, there should be an obligation to remove.⁵ Subject to special stipulation, the ordinary obligations of location apply.⁶ The landlord warrants the furniture fit for use; is discharged of his duty wholly or partially by accidental destruction of the subject; is bound to protect the tenant in his possession and to indemnify him for loss which is not the result of pure accident or tenant's fault. The tenant is bound to pay the rent, subject as above; to take only the contemplated use; to bestow due care, and to restore, barring accidents, the complex subject in as good repair, both as to quantity and quality, as he got it, tear and wear excepted. The ordinary rules of removing and ejection apply to the subject, since it is regarded as *unum quid*. If the rent and the hire are separately stated, the landlord's hypothec will be security for the rent only.⁷ If rent and hire are lumped together, it will secure the whole, on the ratio that 'rent issues out of the 'realty,' which is the principal subject let.⁸

2. *Shops with Fittings: Mines and Factories with Machinery.*

The same rules apply, except as to assigning and subletting,⁹ and the incidence of burdens. An inventory should always be adjusted, for, if not, the onus will be on the landlord of proving delivery. Some English cases may be referred to as illustrating the construction put upon leases of factories and the machinery they contain.¹⁰

3. *Lodgings.*

When lodgings are let, the subject of the contract consists of not only a furnished house or part of a house, but also the use of certain articles which are not usually delivered over in a furnished house, and the benefit of certain services in attendance, cooking, bed-making, shoe-cleaning, and the like. Except where furnishings are withdrawn from the lessor's custody, it is not usual to prepare an inventory. The duration of the contract

⁵ See forms in Woodfall, 894, 896.

⁶ See 1 B.C. 452; B. Pr. 137 *et seq.* and authorities there.

⁷ See *Catterns v. Tennent*, 1834, 12 S. 686; rev. 1 S. and M'L. 694.

⁸ *Ibid.* per L. Brougham, 1 S. and M'L.

717; *Newman v. Anderton*, 2 Bos. and P. 224; *Selby v. Greaves*, L.R. 3 C.P. 594.

⁹ See *supra*, p. 159.

¹⁰ *Duck v. Braddyll*, M'Cl. 217; *Hutchison v. Kay*, 23 Beav. 413; *Haley v. Hammersley*, 3 De G. F. and J. 587.

is usually so short that the readiest remedy in case of breach of the ordinary rules of lease and hiring of moveables and services, is a dissolution of the contract on the usual or stipulated notice *hinc inde*. A formal lease of lodgings is unknown;¹¹ even missives are unusual; a verbal engagement is the ordinary form of the contract.

4. *Factory, Machinery, and Steam-Supply.*

Here in addition to the lease of a building and the hiring of machinery therein, there is a hiring of steam-power for the purposes of manufacture, being either surplus power not required in the lessor's own works, or steam-power let to a number of tenants in contiguous premises all belonging to the lessor, who keeps the engine in his own hands for the common behoof. In either case, this part of the contract is substantially a contract of service. If let without any building it is not a lease. Therefore where a party who obtained steam-power in this way fell into arrear of the stipulated remuneration, a charge given by him to compel a continuance of the supply (which required continual outlay), was, in the absence of caution, suspended on the ground that the case did not fall under the category of a lease in which the landlord must wait till there be a year's arrear of rent before proceeding against his tenant.¹² But, where the letting of steam-supply is combined with a lease of buildings, the latter is regarded as the principal, the former as the accessory, subject and contract;¹³ and if the two contracts (or three if machinery is let) are inseparable and indivisible, the law of leases is applicable to the whole.¹⁴ If, on the other hand, the consideration (rent and hire) for the constituent members of the contract be separate, the rent being fixed and the hire being either fixed at a distinct sum or ascertainable by arbitration, the peculiarities of leases apply only to the subjects for which rent, in the proper sense, as a return proceeding out of heritable property, is payable. In especial this rent alone is secured by hypothec.¹⁵ The terms of the contract are variable to an indefinite degree, so that it would be of little benefit to descend to detail. It will suffice to state, in addition to the doctrines already set forth, what has been decided in cases where contracts of this sort have come

¹¹ See a form in Woodfall, p. 895, containing prohibitions of nuisances, distress, with penalty for quitting between terms.

¹² *Auld v. Baird*, 1827, 5 S. 264 (N.E. 246), approved in *Catterns, infra*,¹⁵

¹³ *Wilson v. Norris*, 10th March 1810,

F.C. 624; *Wilson v. Pollock*, 1827, 6 S. 3.

¹⁴ Op. in *Catterns, infra*,¹⁵

¹⁵ *Catterns v. Tennent*, 1834, 12 S. 686, rev. 1 S. and M'L. 694 (where the rubric states the exact opposite of what was decided).

before the Court. An alleged omission in a formal lease can only be supplied by the writ or oath of the defender.¹⁶ A stipulation to make up stoppages either by extra work or by a deduction of rent does not refer to extraordinary stoppages but only to those of common occurrence; and the lessor must be held to warrant the condition of his engine, and be liable for loss caused to his tenant by any imperfection or fault in it;¹⁷ or, if the loss amounted to a deprivation of part of the subject let, to have the lease thrown back on his hands.¹⁸ Where there was a lease of premises with half the power of a steam-engine, under obligation on the tenant to pay half the expense of keeping the engine at work and in good repair, it was rightly held that the great gearing, which was common to both factories, was included in the subjects let, and that the tenant was not bound to assist in repairing it.¹⁹

5. *Bowing*²⁰ of Cows.

This is a mixed contract of lease and hiring. The proprietor or tenant of a farm lets to a 'bower' the 'bowing' or produce of a dairy of a specified number of milch cows, along with the pasturage of specified fields. The cows remain the property of the lessor, who, unless it be otherwise stipulated,²¹ is at the risk of deaths and casualties rendering them unfit for the purpose of yielding milk.²² Provision is usually made for shifting of the pasturage according to rotation; accommodation in byres; carriages to market; winter-feeding allowances from the farm; and services of the farm-servants. The rent is usually fixed at so much per cow. The public burdens are paid by the lessor. He, besides being owner of the cows, is regarded as in 'possession' or 'charge' of them, to the effect of being responsible for not reporting an outbreak of contagious disease to the local authority.²³ On the other hand, it seems a mistake to say that the bower is merely a manager for the lessor, paid for his services in kind.

¹⁶ *Stewart v. Clark*, 1871, 9 M. 616.

¹⁷ *Wilson v. Norris*, *supra*, ¹³.

¹⁸ See the cognate case of *Kilmarnock Gas Co. v. Smith*, 1872, 11 M. 58 (containing supply of ammonia and tar, involving constant activity on part of lessor).

¹⁹ *Walker v. Turnbull*, 1843, 5 D. 1334.

²⁰ The term is probably connected philologically with βους, bos, bauer, boor, steelbow (*infra*, p. 256). The contract is still known: it has been observed in the Books as existing within the century in

the counties of Ayr, Lanark, Renfrew, Perth, Ross, and Caithness, and in the Stewartry; Cay, Reform Act, 314; Registration Dec., Inverness, 5, and cases *infra*.

²¹ As in *Robertson v. Perthshire Local Authority*, 1883, 10 R. Just. 68.

²² See *Logan v. Hamilton*, 1872, 16 Journ. of Jurisp. 271.

²³ *Robertson*, *supra*, ²¹. It would probably have been different if the bowing had absorbed the whole farm.

He is as much a procurator *in rem suam* as any assignee or sublessee. If the pasture is fixed during the contract without any shifting powers, the elements of combined lease (or sublease) and hire are all present; and a clause obliging the bower to submit to surrogated accommodation in the common interest, it may be, of both parties does not seem to involve a difference of principle.²⁴ Whether the bower be a mere manager or the subtenant of a *fundus instructus*, the cheeses made by him are at common law subject to the landlord's hypothec in the event of non-payment of the tenant's rent.²⁵

6. *Steelbow*.²⁶

The custom of delivering over to a tenant along with a farm a certain stocking, corn, straw, manure, horses, cattle, sheep, or other live-stock and implements, which once, and down to the end of the seventeenth century, was prevalent in Scotland, has, it is believed, wholly died out (or nearly so),²⁷ except in one particular. It is still usual to stipulate for the retention on the land, at outgoing, of unused straw and manure. It will be convenient, however, to postpone a consideration of this survival to a later chapter, dealing with agricultural management.²⁸ In a treatise which professes to describe only the present state of the law, it would be out of place to give more than the briefest notice of an archaic institution.²⁹ An inventory of the steelbow goods was usually made up at entry, and the rent for land and steelbow was separately stated. Provision was sometimes made for valuation at entry and ish, and for payment of the difference of value *hinc inde*; and it was common to declare that the property in the goods remained with the landlord. But the normal obligation imposed on the lessee was to deliver at ish the same quantity or number of goods of the same kind and quality. And the main *crua* in dealing with the contract lay in the question, whether in fact and law the property of the goods did or could remain with the landlord. If so, the contract was lease and hire; if not, it was lease and loan of fungibles (*mutuum* in the

²⁴ See the question noted in *Goldie v. Oswald*, 1839, 1 D. 426, and argued in by Mr. Hunter (i. 344), who leans in favour of managership.

²⁵ *Goldie v. Oswald*, *supra*, ²⁴. In *Logan v. Hamilton*, *supra*, ²², damages were allowed in the Sheriff Court of Renfrew for certain breaches (by the tenant) of a very detailed contract.

²⁶ Steelbow = *bestia ferri* (Ducange) = *cheptel-de-fer* (Code Nap. 1821) =

Eisern-vich = cattle which are not at the owner's risk. Jamieson, *Dict. s.v.*; Innes' *Legal Antiquities*, 241.

²⁷ Mr. Hunter (i. 313) detected two instances in the present century, one in the North-West Highlands, the other in the Hebrides.

²⁸ Chap. xvii.

²⁹ Cr. 1.9.7; Dirl. 386; St. 1.11.14, 2.3.81; Bankt. 1.12.2, 2.3.173; Ersk. 2.6.12, 3.1.18.

wider sense). There seems to be little doubt in principle that in a lease of the ordinary duration, and as to that part of the goods (live stock, &c.) which during its currency perishes with the using, and can not be restored *in specie*, the delivery is an out and out alienation, as in loan of money (*mutuum*) with an obligation to replace *in genere*; and further, that the other goods, being replaceable without regard to risk of furnishing or of tear and wear, are also treated as fungibles; and so the contract has been viewed by the institutional writers,³⁰ and in the earlier decisions.³¹ No argument to the contrary can be drawn from the deduction of steelbow in the confirmation of a tenant's testament,³² for his interest in the *corpus* of the goods though ownership is, on account of the eventual burden of replacement, not an effective asset. It is true, however, that in one case the creditors of a tenant who renounced the lease and died bankrupt were postponed in regard to steelbow in a question with the landlord; but there was much difference of opinion in regard to this question of property, and the decision seems to have turned on hypothec.³³ The radical distinction between the hiring out of cows in a bowing and the delivery of steelbow lies in the risk; and it is not easy to find a workable analogy in any other department of the law to the supposed case of property in moveables *in posse*.

II. FIXTURES.³⁴

In the outset it is necessary to recall the distinctions which Nomenclature. have been already suggested. Fixtures are not repairs, because they are not intended for the mere preservation of the subjects let. Fixtures are not improvements (in the narrower sense of that word), because physically they are removeable *in specie*. Fixtures are not furnishings or plenishing, because they are infixed into or annexed to the subjects let.³⁵ Again, there is the distinction between 'tenants' and 'landlords' fixtures.³⁶

³⁰ St. 1.11.4; Bankt. 1.12.1; Ersk. 3.1.18; B. Pr. 1264. Hunter i. 315 is *contra*. As to the use of *mutuum* even when remuneration is bargained for, see B. Pr. 200; St. *supra*.

³¹ Durie v. Duddingston, 1549, M. 14735; Boyd v. Russel, 1609, M. 5386, 14777; Turnbull v. Ker, 1624, M. 11615, 14777; Lawson v. Boghall Tenants, 1628, M. 14777 (landlord's escheat refused execution till 18th); V. Belhaven v. Ly. Luss, 1637, M. 14778 (*do.*).

³² A.S., 28th Feb. 1666, p. 98; see Bankt. 1.12.3-5.

³³ Butter v. M'Vicar, 1764, M. 6208; 5 B.S. 899, esp. the latter report. See also 2 Bell, Ill. 211; and, as to last crop of hay, Stewart v. Rose, 1816, Hume 229.

³⁴ Brown on Fixtures; Grady on F. and Dilapidation; and especially Amos and Ferard (3rd ed. 1883), may be consulted.

³⁵ *Supra*, p. 218.

³⁶ *Supra*, p. 251.

'Tenants' fixtures.'

'Landlords' fixtures.'

Landlord's or tenant's fixtures.

General law of fixtures.

'Tenants' fixtures' are such moveables as have been annexed by a tenant to the premises, but are removeable by him at or before outgoing. 'Landlords' fixtures' are either (a) moveables annexed by the landlord to the premises, or (b) moveables annexed by the tenant to the premises, and by virtue of that annexation irremoveable by him without the consent of the landlord, whose property they, at the instant of annexation, have become.³⁷ Landlord's fixtures of the first sort³⁸ may be dismissed with the single remark that the amount and quality of such appurtenances are usually arranged between the parties in entering on the contract of lease, and that, in regard to dwelling-houses, much in the absence of special arrangement will depend on the custom of the district, and on the class of house. The rest of this chapter is, therefore, taken up with the question whether fixtures annexed to the premises by the tenant are landlord's or tenant's fixtures, the property of the landlord or of the tenant; irremoveable or removeable by the tenant when he has no longer need of them. In order to a clear view of the problem, it is necessary to give a short sketch of the general law of fixtures.

By a somewhat hasty generalisation of a rule in the Roman law,³⁹ the brocard, *Inædificatum (plantatum, satum) solo solo cedit*, has been applied to all cases where a moveable subject has been infixed in or annexed to an immoveable. The ownership of the one is merged in the ownership of the other.⁴⁰ To this maxim there is no exception. Another rule co-ordinate with it is, that 'whatever becomes part of the inheritance cannot be severed by a limited owner, whether for life or years, without committing an offence which can be restrained.' But to this rule there are exceptions.⁴¹ The *dictum* of an English judge⁴²

³⁷ *Per* L. Watson in *Wake v. Hall*, 1883, 8 App. Cas. 195, 207. 'An agricultural tenant, who builds a barn with its foundation sunk in the soil, ceases the moment the structure is completed to be owner of the materials composing it, and his sole right is thenceforth to occupy as tenant, the holding itself having become the property of his landlord.'

³⁸ See *Farrant v. Thompson*, 3 Stark. 130; *Cox v. Stead*, 1833, 11 S. 672, aff. 7 W. and S. 497; *Fisher v. Dixon*, 5 D. 811, *per* L. Moncreiff.

³⁹ 7 § 10, 28 D. (41.1); 2 C. (3.32); *Gaius* ii. 73; 29-32 I. (2.1). It applied to only two cases of annexation *in alieno*

solo of the annexer's materials—viz., where this took place *sine justo titulo* and *in mala fide*; and where it took place *in bona fide* under a misconception of right. See *Wake v. Hall*, *supra*,³⁷; *Gesterding*, § 31; *Puchta* ii. p. 695; *Vangerow*, § 329.

⁴⁰ Cr. 1.9.7, 2.8.3; St. 2.1.40; *Mack*. 2.1.6; *Bankt.* 2.1.18; *Ersk.* 2.1.15, 2.2.4; 1 B.C. 753; B. Pr. 937, 1473; *More's Notes*, 143.

⁴¹ *Per* L. Chan. Cairns in *Brand's Trs.* v. *Brand's Trs.*, 1876, 3 R. (H.L.) 16, 20.

⁴² L. Ellenborough in *Elwes v. Maw*, 1802, 3 East 38, 2 *Smith's Leading Cases*; see *Syme v. Harvey*, 1861, 24 D. 202, 210 (*per* L. Colonsay); *Anderson v. Thomson*, 1852, 1 Stu. 917.

has been regarded as law in both countries, in distinguishing between the principal cases in which the rule is applied. 'As between heir and executor, the rule obtains with most vigour in favour of the inheritance, and against the right to disannex therefrom. Between the executors of tenant for life or in tail, and the remainder-man or reversioner, the right to fixtures is considered more favourably for executors than in the preceding case. The third case—and that in which the greatest latitude and indulgence have always been allowed in favour of the claim to having any particular articles considered as personal chattels [moveables] as against the claimant in respect of freehold or inheritance—is the case between landlord and tenant.' In making use of this rule in estimating the value for the present inquiry of decisions in questions between parties other than landlord and tenant,⁴³ it is well to remember (1) that questions between vendor and purchaser, between heritable and ordinary creditors, and as to the proper form of diligence, are governed by substantially the same rules as obtain between heir and executor;⁴⁴ (2) that cases which have in other departments gone in favour of removeability are *a fortiori* in questions between landlord and tenant, while cases with an opposite result are not necessarily precedents here; and (3) that the laws of England and Scotland seem to be identical in questions as to fixtures⁴⁵—a fortunate circumstance, since our books are singularly poor in valuable illustration.

All questions regarding fixtures turn on two facts—the one physical, the other mental—the fact of annexation and the intention with which it was made. Of the relative importance of these two factors in the problem, it may be enough to say that in the case of certain articles, improperly called fixtures, the mere intention is enough to cause them to share the fate of fixtures without being themselves annexed. The annexation is only constructive where keys of doors;⁴⁶ title deeds;⁴⁷ covers of wells;⁴⁸ loose articles necessary for the use of certain machinery,⁴⁹ even though only as duplicates which had been fitted in, and were

Annexation
and intention.

Constructive
fixtures.

⁴³ The rules in questions between heir and executor of a tenant are the same as between heir and executor of a proprietor—*Brand's Trs. v. Brand's Trs.*, 1874, 2 R. 258, rev. 3 R. (H.L.) 16, explaining *Fisher v. Dixon*, *infra*, ⁴⁹.

⁴⁴ See authorities collected in Rankine, *Landownership*, p. 114.

⁴⁵ *L. Brougham in Fisher v. Dixon*, 4 B. Ap. 353; *L. Chelmsford in Brand's Trs. v. Brand's Trs.*, 3 R. (H.L.) 23.

⁴⁶ *Liford's Ca.*, 11 Co. Rep. 50; *Place v. Fagg*, 4 M. and R. 277.

⁴⁷ 2 Ross' Lect. 381; *Bell on Titles*, 67.

⁴⁸ Illustration in *Fisher v. Dixon*, *infra*, ⁴⁹.

⁴⁹ *Fisher v. Dixon*, 1843, 5 D. 775, aff. 4 B. Ap. 286; *Brand's Trs. v. Brand's Trs.*, 1874, 2 R. 258, rev. 3 R. (H.L.) 16.

ready in case of need;⁵⁰ and a factory bell⁵¹ go with the principal subjects to which they are merely accessory. On the other hand, though the mode of annexation and degree of incorporation are always important elements in determining the intention of the annexer, they can in no case be said to be conclusive so as to shut out other proof.

I. *The Physical Fact of Annexation.*

This factor in the problem is so intimately connected with the other that it is difficult to keep the two apart even in exposition. When the cases are narrowly scanned, however, it will be seen that the distinctions drawn by Lord Ellenborough have no importance here. For the same circumstances will lead to the same conclusion in favour of or adverse to the existence of annexation as a physical fact, whatever be the relation of the disputants. For a matter depending wholly on the circumstances of each case it is impossible to formulate rules. But two tests of annexation have been frequently made use of.

The same in all questions of fixtures.

Removal without injury.

(1) The impossibility of disannexing without material injury to the fixture, or to the premises, or to both. If such exist the article is a fixture; if not, it has remained moveable.⁵² This test applies, in favour of irremovability, to buildings put together *in situ*, and only removeable after being resolved into their constituent materials;⁵³ to large vessels which, though kept in position only by their own weight, would have to be taken to pieces or melted down in order to removal;⁵⁴ and to sheds built in brickwork, and posts and rails fixed to the ground.⁵⁵ On the other hand, such erections remain moveable as may be removed without injury, though they may have sunk into the ground by their own weight. Of this sort are barns, sheds, or mills erected on blocks, pattens, or pillars resting on brickwork, but otherwise unfastened.⁵⁶

⁵⁰ *Ex parte Astbury*, L.R. 4, Ch. 630; see cases of poinding—*Sibbald v. L. Sinclair*, 1555, M. 10504; *Smeton v. Brand*, 1698, M. 10524.

⁵¹ *Barr v. M'Ilwham*, 1821, 1 S. 124 (N.E. 122).

⁵² *Integre salve et commode, per Parke B. in Hellawell v. Eastwood*, 6 Exch. 295, 312; *Fisher v. Dixon*, *supra*, ⁴⁹ 5 D. 793; *quæ salve moveri nequeunt*, Heineccius, sect. 199.

⁵³ *Leach v. Thomas*, 7 C. and P. 327.

⁵⁴ *Niven v. Pitcairn*, 1823, 2 S. 270 (N.E. 240) (security); see *Horn v. Baker*,

9 East 215, 2 Sm.L.C. s.v.; *Jenkins v. Gething*, 2 J. and H. 520.

⁵⁵ *Fitzherbert v. Shaw*, *infra*, ⁵⁶ as criticised in *Elwes v. Maw*, *supra*, ⁴³.

⁵⁶ *Huntley v. Russell*, 13 Q.B. 572; *Rex v. Otley*, 1 B. and Ad. 161 (wooden windmill); *Wansborough v. Maton*, 4 A. and E. 884 (barn); *Dean v. Allaley*, (dutch-barns), 3 Esp. 11; *Penton v. Robart*, 4 Esp. 33; *Fitzherbert v. Shaw*, 1 H.Bl. 258; and cases of conservatories, *infra*, p. 265; *Mather v. Fraser*, 2 Kay and J. 536; *Culling v. Tuffnal*, Buller's N.P. 34 (custom).

2. In the absence of such intimate connection, a special advantage may accrue to the premises from the annexation of an article, either from its being essential or material to the enjoyment of the premises or their fruits; or from its being specially adapted in its construction to the enjoyment of the premises.⁵⁷ This test is illustrated by the leading case of the salt-pans, which were 'accessories necessary to the enjoyment and use of the principal';⁵⁸ by cases in which machinery has been held to be a fixture, though capable of being removed, either in its entire state or in parts, without material injury, the ground of judgment being that the whole machinery was part of the general apparatus necessary for the enjoyment of the subjects;⁵⁹ and by cases in which ornaments which formed a part of the architectural design of a building went with it.⁶⁰ But this test is, as will shortly be seen, so closely connected with the intention of the annexation, that it can only be applied with great caution in questions between landlord and tenant. On the other hand, machinery not essential to, or specially adapted for, the use and enjoyment of the premises is moveable, though screwed to the same or otherwise fixed, merely to steady it for more convenient use as a machine.⁶¹

Special advantage or adaptation from annexation.

II. *Intention.*

The intention of the person who makes the annexation is of primary importance in questions between landlord and tenant. In other cases—for example as between heir and executor of the owner of an estate—it may not be easy and it might not be very material—to discover whether the ancestor meant the subject annexed to go with his heritable estate or for the benefit of his personal representatives. In the case of a tenant it is different. He knows the duration of his tenure and the risk he runs by annexing property of his own to premises of which he is only the temporary possessor. On the other hand, the premises may be only of use to him for the purpose of containing and sheltering property of his own, or as the *locus* of a business which cannot be carried on without fixtures. The problem is to what extent these fixtures remain his property. And the solution depends mainly on the answer to these questions: What was the purpose of the annexation? *i.e.*, What was the use intended to

Tests.

⁵⁷ *Per* L.J.-C. Moncreiff in *Dowall v. Miln*, 1874, 1 R. 1180.

⁵⁸ *Lawton's Exrs. v. Salmon*, 1 H.B.L. 259 note; cf. *E. Mansfield v. Blackburn*, 6 Bing. N.C. 426.

⁵⁹ *Fisher v. Dixon*, *supra*, ⁴⁹; *Brand's Trs. v. Brand's Trs.*, 1874, 2 R. 258, *rev.*

3 R. (H.L.) 16; *Stiven v. Cowan*, 1878, 15 Sc.L.R. 422; 1 B.C. 725.

⁶⁰ *D'Eyncourt v. Gregory*, L.R. 3 Eq. 382.

⁶¹ *Trappes v. Harter*, 2 Cr. and M. 177, 6 Exch. 313; *Hellawell v. Eastwood*, 6 Exch. 295, 312.

be furthered by the annexation? not, What was the ultimate intention of the tenant—to disannex or not? Was it for the improvement of the premises during his possession? Or was it for the sake of the better enjoyment of the thing annexed?⁶² In illustrating the operation of these questions, it will be convenient to make two distinctions: *First*, between non-agricultural and agricultural subjects, since the law relating to the latter is cleared (or obscured) by statute, while the law relating to the former is the common law of the land; and *second*, between fixtures for ornament or convenience, and fixtures for the purposes of trade. It will be borne in mind that what follows applies to moveables which have become either constructively or by physical annexation fixtures,⁶³ and the question is in what circumstances they can be disannexed and removed by the tenant.

A. Non-Agricultural Subjects.

1. *Fixtures for Ornament, or Convenience, or Domestic Use.*

Least favourable to tenant.

This is the case in which the tenant's claim to remove fixtures is least strong,⁶⁴ and will only be given effect to where the argument that the tenant repays himself for his outlay by enjoying the fixture during the lease can be fairly met with the counter plea that, the annexation being designed for a temporary purpose, it would be hard if every slight attachment to the premises let should deprive the tenant of his control over them.⁶⁵ So that, in the absence of other evidence of intention, it may be necessary to fall back on the mode or amount of annexation, the permanent or temporary character of the fixture, removeability without injury, and the like. Thus ornamental shrubs planted and turf laid down by a tenant for ornament,⁶⁶ a border of box,⁶⁷ and growing trees,⁶⁸ cannot be removed by him as matter of right; and a conservatory, erected on a brick foundation and opening into rooms in a dwelling-house, will be irremove-

⁶² *Perpetui usus causa* or not, Heinccius, *supra*,⁵²; Parsons v. Hind, 14 W.R. 860, *per* Blackburn, J.; Hella-well v. Eastwood, 6 Exch. 295, 312, *per* Parke B.; see also Lancaster v. Eve, 5 C.B.N.S. 717, 728; Reg. v. Lee, 14 W.R. 311; Martin v. Roe, 7 E. and B. 237, 248; Walmsley v. Milne, 7 C.B.N.S. 115, 131, 138; Tod's Trs. v. Finlay, 1872, 10 M. 422. Lord M'Laren's fourth point (relative value of fixture and holding) in Ferguson v. Paul, 1885, 12 R. 1222, if relevant, is only so as an element in this test

⁶³ *Supra*, p. 259.

⁶⁴ Buckland v. Butterfield, 2 Brod. and B. 54; Leach v. Thomas, 7 C. and P. 327.

⁶⁵ Amos and Ferard, 116.

⁶⁶ Burns v. Fleming, 1880, 8 R. 226 (probably same as to gravel strewn); *dicta* in Syme v. Harvey, 1861, 24 D. 202, with which contrast cases of trade, *infra*, p. 264.

⁶⁷ Empson v. Soden, 4 B. and A. 655.

⁶⁸ Windham v. Way, 4 Taunt 316.

able by a tenant, although he put it up for his own convenience.⁶⁹ A verandah attached to posts fixed in the ground must be left behind at outgoing,⁷⁰ as well as kitchen-ranges, ovens, and set pots built in.⁷¹ The question whether the injury entailed by detachment would be substantial is one of fact.⁷² Subject to specialties, which may arise out of the mode of annexation and difficulty of detachment, the following articles may be regarded as tenant's fixtures⁷³—viz., hangings, tapestry, and pier glasses, whether nailed to the wall or panels, or put up in lieu of panels;⁷⁴ cornices;⁷⁵ marble or other *ornamental* chimneypieces;⁷⁶ marble slabs;⁷⁷ window blinds;⁷⁸ wainscote fixed to the walls by screws;⁷⁹ grates, ranges, stoves, furnaces, coppers, though set in brick-work;⁸⁰ iron backs to chimneys;⁸¹ pumps;⁸² cupboards fixed with holdfasts;⁸³ bookcases screwed to the walls;⁸⁴ beds fastened to wall or ceiling;⁸⁵ wooden steps on a garden path.⁸⁶ Any injury caused to the premises by removal must be repaired by the tenant; and he must restore any article still extant to its former position or replace it with a similar one, when he is removing an article of his own which he has substituted for it during his tenure.⁸⁷ It makes little difference, if any, that the annexation is made by means of screw-nails and not ordinary nails.

(2) *For Purposes of Trade or Manufacture.*

The exception here is general. It would seem that all trade fixtures are removeable by the tenant who (or whose author) set them up; provided that there be no custom⁸⁸ or stipulation⁸⁹ to the contrary, and that the fixtures can be recognised and disannexed *in specie*, or in such a way as to permit of their being reinstated

⁶⁹ Buckland v. Butterfield, *supra*, 64; West v. Blakeway, 2 M. and G. 729. See the Scotch case of Ferguson v. Paul, 1885, 12 R. 1222, discussed *infra*, p. 270.

⁷⁰ Penry v. Brown, 2 Stark. 403.

⁷¹ Winn v. Ingilby, 5 B. and A. 625.

⁷² Avery v. Cheslyn, 3 A. and E. 75; Leach v. Thomas, *supra*, 64; Harrow School v. Alderton, 2 B. and P. 86.

⁷³ Lists in Woodfall, 630; Chitty, Contracts, 336, 1 B.C. 789 (7th ed.).

⁷⁴ Squier v. Mayer, 2 Freem. 249; Beck v. Rebow, 1 P. Wms. 94; Buckland v. Butterfield, *supra*, 64.

⁷⁵ Avery v. Cheslyn, *supra*, 72.

⁷⁶ Lawton v. Lawton, 3 Atk. 15; Leach v. Thomas, *supra*, 64; Bishop v. Elliott, 11 Exch. 115, 120-2.

⁷⁷ Allen v. Allen, Moseley 112.

⁷⁸ Amos and F. 110.

⁷⁹ Lawton v. Lawton, *supra*, 76; Dudley v. Warde, Amb. 113.

⁸⁰ Lee v. Risdon, 7 Taunt. 191; Squier, *supra*, 74; Poole's Ca., 1 Salk. 368; Winn v. Ingilby, 5 B. and A. 625.

⁸¹ Harvey v. Harvey, 2 Stra. 1141.

⁸² Grymes v. Boweren, 6 Bing. 437.

⁸³ Rex v. St. Dunstan, 4 B. and C. 686.

⁸⁴ Birch v. Dawson, 2 A. and E. 37.

⁸⁵ Exp. Quincey, 1 Atk. 477.

⁸⁶ Burns v. Fleming, 1880, 8 R. 226.

⁸⁷ Martyr v. Bradley, 9 Bing. 24; Sunderland v. Newton, 3 Sim. 450.

⁸⁸ See Culling v. Tuffnal, Buller, N.P. 34; Davis v. Jones, 2 B. and A. 165.

⁸⁹ *Infra*, p. 269.

in specie.⁹⁰ It would appear, moreover, that fixtures may be removed even though not capable of being so disannexed, if they are merely accessories to things removeable.⁹¹ The ground of the exception is said to be the public advantage, as giving encouragement to tenants to improve the apparatus of their trade with the certainty of getting the full benefit of their outlay.⁹² It is equally true to say that the tenant in annexing trade fixtures does so with no intention to improve the shop or factory or to make the landlord a gift of the reversion, but solely for the purpose of being the better able to make use of the machine or fitting in prosecution of his trade or manufacture;⁹³ and that there is no rule of law to prevent his intention being given effect to, since the possession is open and no false credit is set up. 'It would be injurious to trade if a tenant were told that he must contrive to conduct his trade with property which must not be affixed to the soil or he would at once be held to have made a present of it to his landlord.'⁹⁴

Examples.

Therefore, the following fixtures have been held or may be taken as removeable in questions between landlord and tenant:—bakers' ovens; dyers' vats;⁹⁵ soap-boilers' vats, coppers, tables, and partitions;⁹⁶ colliery engines;⁹⁷ salt-pans;⁹⁸ coppers and pipes in breweries;⁹⁹ stoves, cooking-coppers, mash-tubs, water-tubs, and blinds;¹⁰⁰ varnish house;¹⁰¹ machinery or part thereof;¹⁰² spinning-mules, screwed or soldered to the floor of a factory;¹⁰³ probably a safe built into a wall;¹⁰⁴ in nursery and market gardens the trees and shrubs, though in full bearing,¹⁰⁵ and the glass frames and

⁹⁰ *Whitehead v. Bennett*, 27 L.J.Ch. 474, 476. See *Syme v. Harvey*, 1861, 24 D. 202.

⁹¹ *Ibid.*, and see *Wake v. Hall*, 8 App. Cas. 210; *Amos and F.* 64.

⁹² *Lawton v. Lawton*, 3 Atk. 14, 16; *Penton v. Robart*, 2 East 88.

⁹³ *Parsons v. Hind*; *Hellawell v. Eastwood*, *supra*, ⁶², ⁶⁴.

⁹⁴ *Per Wood V.C.* in *Mather v. Fraser*, 2 Kay and J. 536, 548.

⁹⁵ Year-book, 20 Henry 7, pl. 13, quoted in *Woodfall* 627.

⁹⁶ *Foole's Ca.*, *supra*, ⁸⁰.

⁹⁷ *Lawton v. Lawton*, *supra*, ⁹²; *Dudley v. Warde*, Amb. 114; *Minshall v. Lloyd*, 2 M. and W. 450.

⁹⁸ *E. Mansfield v. Blackburn*, 6 Bing. N.C. 426; *secus* as between heir and executor, *Lawton's Exrs. v. Salmon*, *supra*, ⁵⁸.

⁹⁹ *Per L. Hardwicke* in *Lawton v. Lawton*, *supra*, ⁹²; *ex parte Quincy*, 1 Atk. 477.

¹⁰⁰ *Colgrave v. Dios Santos*, 2 B. and Cr. 76.

¹⁰¹ *Penton v. Robart*, *supra*, ⁹².

¹⁰² *Davis v. Jones*, 2 B. and Ald. 165.

¹⁰³ *Hellawell v. Eastwood*, *supra*, ⁶⁴; cf. *Waterfall v. Penistone*, 6 E. and B. 876, commented on in *Cullwick v. Swindell*, L.R. 3 Eq. 249; *Dowall v. Miln*, 1874, 1 R. 1180, where L.J.-C. Moncreiff's opinion is an excellent summary of the law.

¹⁰⁴ See *Waldie v. Commercial Bank*, 1842, 14 Sc. Jur. 583.

¹⁰⁵ *Wardell v. Usher*, 3 Sc.N.R. 508; *dicta* in *Penton v. Robart*, *supra*, ⁹²; and in *Gordon v. Gordon*, 1806, Hume 188; B. Pr. 1475; and see *Begbie v. Boyd*, 1837, 16 S. 232.

heating apparatus of green-houses and hot-houses therein.¹⁰⁶ It has never been decided whether the built part of such houses may also be removed.¹⁰⁷ It may be suggested that it ought not to be removeable, since it could not be removed *in specie*, but only after being reduced to its component parts; but that a different rule will apply in the case of market-gardens, to which the Agricultural Holdings Act applies.¹⁰⁸ But a gardener is not entitled wantonly to plough up strawberry beds before outgoing, although he might have sold the plants in course of his trade.¹⁰⁹ The objection that the fixtures could not be removed *salvâ rei substantiâ* would probably entitle the landlord to prevent the breaking up and removal of lime-kilns, brick-kilns, mills, workshops, and erections of a similarly substantial and permanent character.¹¹⁰

It is certain that a tenant would, while an executor or personal creditor might not, be entitled to remove fixtures such as—the machinery of a cotton mill;¹¹¹ large vessels in a factory, removeable only after being broken up or melted down;¹¹² and the engines and machinery of a mine or quarry.¹¹³ In the leading case (as to *legitim*) of *Fisher v. Dixon*, a remit was made to inquire into the practice of removing or retaining mining machinery set up by a tenant during his lease. The reply was: ‘The general practice at coal and iron works similar to those of the deceased is for the tenant, in the event of the termination of his lease, to remove the whole of such engines and machinery, if not previously belonging to the landlord or specially acquired to him by the terms of the lease; and in the event of the exhaustion of the mineral field or any permanent bar arising to the profitable working of the minerals, the whole of the engines and machinery are removed by the tenant or worker of the field, or by the proprietor, if his property, and the general premises dismantled as it may be profitable to do so.’¹¹⁴ The same practice prevails at the present day. Lastly, there has been much controversy—since the passing of the Agricultural Hold-

¹⁰⁶ *Syme v. Harvey*, 1861, 24 D. 202.

¹⁰⁷ See *Syme*, ¹⁰⁶; *Elwes v. Maw*, *supra*, ⁶⁴; *Buckland v. Butterfield*, ⁴²; *Martin v. Roe*, 7 E. and B. 237.

¹⁰⁸ *Infra*, p. 267.

¹⁰⁹ *Watherell v. Howells*, 1 Campb. 227.

¹¹⁰ See *Thresher v. E. London Waterworks Co.*, 2 B. and Cr. 608; *Whitehead v. Bennett*, 27 L.J.Ch. 474; *Foley v. Addenbrooke*, 13 M. and W. 174.

¹¹¹ *Arkwright v. Billinge*, 3 Dec. 1819, F.C. 52 (security), doubted in 1 B.C. 755, Brodie’s note to St. 2.1.40, Sandf. Herit. Succ. 220, and explained in *Niven v. Pitcairn*, 1823, 2 S. 270 (N.E. 239).

¹¹² *Niven v. Pitcairn*, *supra*, ¹¹¹ (security).

¹¹³ *Fisher v. Dixon*, *supra*, ⁴⁹; *Brand’s Trs. v. Brand’s Trs.*, 1878, 5 R. 607.

¹¹⁴ 5 D. 789.

ings Act¹¹⁵ of no practical interest—whether a tenant would be entitled to remove a cider-mill, the question turning on its true character as an implement of trade or a farming utensil.¹¹⁶ There seems, however, to be no sufficient reason for the view¹¹⁷ that the machinery of a grist-mill would be treated differently from other trade fixtures, the circumstance that such mills were transferred by a peculiar infestment¹¹⁸ being immaterial.¹¹⁹ In the decisions noticed above in regard to nursery and market gardens—*mixed* cases between trade and agriculture¹²⁰—the former element prevailed even before the passing of the Act now to be mentioned.

B. *Agricultural Subjects.*

Common law
rules.

Prior to 1st January 1884, the date at which the Agricultural Holdings (Scotland) Act of 1883 came into force, an agricultural tenant was, in regard to fixtures placed by him on his farm for the better enjoyment of it as such and not in connection with any trade carried on by him in it, in a much less favourable position than a tenant who had annexed trade fixtures. If there was physical annexation, as explained above,¹²¹ he was not entitled to remove what by annexation had become the property of the landlord.¹²² This was the inevitable result of the test of intention.¹²³ The annexation was made for the improvement of the premises during his occupation, not for the sake of better enjoyment of the thing infixed. In England the rule was applied in the leading case to a beast-house, carpenter's shop, fuel-house, cart-house, and fold-yard wall, all built of brick and mortar, tiled and let into the ground.¹²⁴ In Scotland the same rule was established,¹²⁵ no discrimination being admitted between different parts of a fixture which had to be regarded as *unum quid*; and a broad distinction was drawn between 'landlords' fixtures (such as buildings) which the tenant, though he had erected them, could not remove and need not leave in repair,¹²⁶ and 'tenants'

¹¹⁵ *Infra*, p. 267.

¹¹⁶ *Lawton v. Lawton*, 3 Atk. 14 (former view taken); disapproved in *Fisher v. Dixon*, 4 B. Ap. 352, 357, 359; *Walmsley v. Milne*, 7 C.B.N.S. 115.

¹¹⁷ See *Arkwright v. Billinge*, *supra*, 111.

¹¹⁸ Cr. 2.3.24, 27, 2.7.6, 2.8.5; St. 2.3. 71, 2.7.15; Bankt. 2.3.94, 2.7.42; Ersk. 2.3.36.

¹¹⁹ 1 Hunter, 306.

¹²⁰ *Per* L. Hardwicke in *Lawton v. Lawton*, 3 Atk. 16.

¹²¹ P. 258.

¹²² *Per* L. Ellenborough in *Elwes v.*

Maw, *supra*, 42.

¹²³ *Supra*, p. 261.

¹²⁴ *Elwes v. Maw*, *supra*, 42, in contradistinction to the earlier cases (*Culling: Fitzherbert*) cited above,⁵⁶ where there was no proper annexation.

¹²⁵ *Murray v. Bisset*, 1805, Hume 818 (*obiter*); *Hyslop's Trs. v. Hyslop*, 18th January 1811, F.C. 143, as corrected in *Arkwright v. Billinge*, 3rd Dec. 1819, F.C. 55.

¹²⁶ *Thomson v. Oliphant*, 1822, 1 S. 307 (N.E. 284), B. Pr. 1254; see *Dunn's Trs. v. E. Zetland*, 1862, 24 D. 801.

fixtures (such as wire fences, feal, dry-stone or other temporary dykes, and (probably) pailings) which he might remove, or, if he did not remove them, must leave in repair.¹²⁷

The 30th section of the Agricultural Holdings (Scotland) Act, 1883,¹²⁸ altered this unjust state of the law in substantial conformity with an earlier statute which applied only to England.¹²⁹ As has been already explained, the Act applies to agricultural, pastoral, market-garden, and mixed holdings (sect. 35). The section referred to in substance enacts that engines, machinery, fencing, and other fixtures and buildings¹³⁰ affixed or erected after 1st January 1884 by a tenant to or on his holding, without being entitled under the Act or otherwise to compensation, and under no obligation, and not as substitute for a landlord's fixture or building shall be the tenant's property and be removeable by him before or within a reasonable time after the termination of the tenancy, provided (1) before removing them he has paid all rent owing by him and has performed all his other obligations to the landlord in respect of the holding; (2) he does no avoidable damage to the holding in the removal; (3) he immediately makes good all damage so done; (4) he has given a month's written notice. The landlord before expiration of the notice may notify to him his election to purchase any fixture or building therein specified, in which case it must be left by the tenant; it becomes the landlord's property; and the value to be paid is ascertained, in the absence of agreement, by a reference to arbiters under the provisions of the Act.

It will be observed that the operation of this section is excluded as to any fixture or building for which the tenant is entitled to compensation under the Act. The reference is to the provisions relating to Part I. of the schedule which includes, *inter alia*, the erection or enlargement of building; the formation of silos; the making or improving of bridges; the making or improving of water-works; the making of permanent fences; and the weiring or embanking of land and sluices against floods. These or parts of these may be fixtures or buildings in the sense of this present section. And

Agricultural Holdings Act.

Relation to scheduled improvements.

¹²⁷ Andrew v. Morison, 19th January 1811, F.C. 152 (dykes ultroneously erected and in their ruinous state a nuisance); D. Buccleuch v. Tod's Trs., 1871, 9 M. 1014 (wire fences); *contra* as between vendor and purchaser, Graham v. Lamont, 1875, 2 R. 438 (wire fences).

¹²⁸ 46 & 47 Vict. c. 62, sect. 30, printed in Appx. No. ii. The scope and general

provisions of the Act are explained, *supra*, p. 237.

¹²⁹ 14 & 15 Vict. c. 25, sect. 3.

¹³⁰ See the construction put on the word 'building' in other Acts, Haig v. Henderson, 1830, 8 S. 912; Partick Police Comrs. v. G. W. Steam Laundry Co., 1886, 13 R. 500.

the tenant is under other sections of the Act entitled to compensation in respect of them, provided that before he executed them he had obtained the written consent of the landlord or his duly authorised agent on terms or unconditionally (sects. 1, 3), and had given the statutory notice of claim four months at least before the determination of the tenancy (sect. 7). The opinion may be hazarded (though with diffidence) that such an agreement between landlord and tenant would definitively oust the operation of the 30th section, and that the neglect of the tenant to give notice would not revive it. He would be understood in such a case to have given up all right either to compensation or to removal, on the ground that when 'entitled to compensation' he had not taken the only legal means of ascertaining the amount.¹³¹

Exceptions.

The operation of the section is also excluded (1) as to all fixtures and buildings made or erected before 1st January 1884; (2) where there is a contrary stipulation (since this part of the Act is not compulsory); (3) where there is a custom of compensation;¹³² (4) where there was a pre-existent obligation to make or erect; (5) where the fixture or building comes 'instead of' a landlord's fixture or building. The result in these circumstances is that the property in the buildings or fixtures does not vest in the tenant and that he is not entitled to remove them, by virtue of the Act at least. The words of the section are wide enough to cover all buildings and fixtures, not only such as are put up for the purposes of agriculture.¹³³ So that the tenant would appear to have an alternative claim in regard to fixtures put up for trade purposes or for convenience, ornament, or domestic use; either to trust to the common law or to appeal to the Act.

All fixtures,
&c., included.

It would be a judaical construction of the section to hold that on a breach of any of these provisos the property in the buildings and fixtures reverts in the landlord.¹³⁴ The first and fourth in substance regulate the date of removal; the second and third the mode of removal; and the fifth sets out the only method in which reversioning can take place under the provisions of the Act. The allowance of a 'reasonable time' for removal will be noticed on a later page.¹³⁵ As in other references under the Act, there is no appeal to the sheriff from his substitute (sect. 20).

¹³¹ Brookes-Little, p. 97, *contra*.

¹³² *Supra*, pp. 230, 243.

¹³³ Contrast the more limited terms of the English Emblements Act, 14 & 15 Vict. c. 25 ('agricultural purposes or for 'the purposes of trade and agriculture'); and cf. 38 & 39 Vict. c. 92, sect. 53;

and cf. 38 & 39 Vict. c. 92, sect. 53; Jeurwine, p. 28, *contra*.

¹³⁴ Lely and Pearce-Edgcumbe, p. 102, *contra*. See *Laing v. Stephenson*, 1848, 11 D. 142.

¹³⁵ *Infra*, p. 271.

III. *Construction of Special Stipulations as to Fixtures.*

In many cases, the operation of the rules thus set forth is excluded by the agreement of parties, and then the sole duty of the Court is to interpret the stipulation so substituted for the provisions of common law and statute. Each case depends on its own peculiar circumstances, and little instruction can be drawn from decisions in which general rules of construction can only with difficulty be extracted from the environment of special matter. An attempt will, however, be made to indicate how these general rules have been applied, always subject to the caution that it would be unsafe to trust to a brief *résumé* without resorting to the report cited.

In Scotland, it has been decided that an obligation laid on a Scottish cases. tenant in his lease to build and erect a thrashing-mill bound him to fit it up with machinery, and that, having done so, he was not entitled, in accordance with the custom of the district, to remove the machinery at outgoing;¹³⁶ and that a wooden *chalet* was included in 'dwelling-houses' for which a tenant had a right under his lease to compensation.¹³⁷ The ordinary clause obliging a tenant to leave the subjects in good tenantable condition does not oblige him so to leave temporary fittings put up by him in a cottage which he used as a stable, but if the fittings 'had been 'permanent fixtures the case might have been different.'¹³⁸ In a short lease or rather a bargain for the temporary use of waste ground pending negotiations for selling it as a business stance, a permission to remove erections thereon, which if strictly read applied only to a premature removing, was held to apply also when the lease ran out by effluxion of time.¹³⁹ Where a lease was turned into a feu and the feu-right was afterwards reduced the tenants lost right to found on a compensation clause, in so far as the fixtures were added before the date of the feu.¹⁴⁰ A Ferguson v. Paul. A recent decision which turned on a special stipulation seems to be open to question. The subjects let were a house and garden, and the stipulation was that the tenant should not remove any of the trees 'except to replace them by others of equal quality and 'value.' The tenant, an amateur florist (who competed largely at

¹³⁶ *Campbell v. Howden*, 1825, 3 S. 569 (N.E. 391).

¹³⁷ *Murray v. Campbell*, 1879, 6 R. 1163.

¹³⁸ *Scott v. Ewart's Reps.*, 1824, 3 S. 344 (N.E. 244).

¹³⁹ *Thomson v. Harvie*, 1827, 5 S. 227 (N.E. 211).

¹⁴⁰ *Selkirk Mags. v. Clapperton*, 1830, 9 S. 9. See a case of partnership, *Cox v. Stead*, 1833, 11 S. 672, aff. 7 W. and S. 497; and case where a landlord's notice to quit superseded necessity for tenant's notice of claim, *Laing v. Stephenson*, 1848, 11 D. 142.

flower-shows and occasionally sold plants), cut down trees, and put up greenhouses at a cost exceeding the value of the whole holding, and removed them before outgoing. He was held entitled to do so. The judgment proceeded partly on the fact, held to be proved, that the landlord when letting the subjects knew the tenant's intentions, but chiefly on the view that the stipulation cited implied power to remove the greenhouses in order to replace the trees. The former *ratio* seems plainly irrelevant; and the latter may be deemed insufficient, the more obvious meaning of the clause being, as Lord Rutherford Clark (who dissented) pointed out, that the replacement should at once follow the removal of the trees. The element of trade was not involved, and in no other case of a fixture of this character erected for ornament or convenience has the tenant's intention, not to improve the premises, but the better to enjoy the fixture by annexing it, been held to bar the passing of the ownership to the landlord.¹⁴¹

English cases.

The English books are, as usual, much more prolific of authorities. Where there is a covenant binding the tenant to yield up at the termination of his lease, certain enumerated articles and general words follow, such as, 'and all other things,' or 'and other additions, improvements, fixtures, and things,' the rule that words so tacked on are to be taken as meaning articles *ejusdem generis* comes into play only if the enumerated articles belong to some assignable genus; otherwise they are read as restricted only by their own proper meaning, including, it may be, even trade fixtures.¹⁴² The rule, *noscitur a sociis*, when applicable, may enable the Court to confine the covenant to 'landlord's fixtures, excluding trade and tenant's fixtures;' ¹⁴³ and the same result may follow on a sound interpretation of an express exception in the covenant itself.¹⁴⁴ But a covenant which contains only general words must be allowed its full and fair scope. Thus an obligation to leave 'improvements' is wide enough to include new mill-stones; ¹⁴⁵ 'buildings' erected for trade are struck at by a covenant to yield up *all* buildings.¹⁴⁶ A covenant to leave in repair bars removal of lime-kilns,¹⁴⁷

¹⁴¹ *Ferguson v. Paul*, 1885, 12 R. 1222 (L. Rutherford Clark also held the landlord's knowledge not proved).

¹⁴² *Wilson v. Whately*, 1 J. and H. 436; *Bidder v. Trinidad Petroleum Co.*, 17 W.R. 153.

¹⁴³ *Bishop v. Elliott*, 11 Exch. 113.

¹⁴⁴ *Foley v. Addenbrooke*, 13 M. and W. 174.

¹⁴⁵ *Martyr v. Bradley*, 9 Bing. 24.

¹⁴⁶ *Naylor v. Collinge*, 1 Taunt. 19.

¹⁴⁷ *Thresher v. E. London W.W. Co.*, 2 B. and C. 608.

salt-pans,¹⁴⁸ verandah,¹⁴⁹ a greenhouse,¹⁵⁰ and running machinery.¹⁵¹

IV. *Time and Mode of Removal.*

Tenants' fixtures may be removed at any time during the ^{Time.} currency of the lease. In the case of removings which take place at different periods for different parts of the subjects let—as for example a Whitsunday and separation ish—the Court would probably distinguish between the real determination of the tenancy and the supervenient period allowed to the tenant for a limited purpose such as the reaping of white crop, and fix on the former date as decisive. An important question arises, however, as to the right of the tenant to any extension of time beyond the term of removing from the premises. The Agricultural Holdings Act allows 'a reasonable time after the termination of the 'tenancy' (sect. 30). It seems clear, moreover, that some period ^{Reasonable time after ish.} ^{Ish uncertain.} of grace must be allowed where the duration of the lease is from the first uncertain—as in tenancies at will or for life, or during the lessor's life;—or where the lease comes to an end through an extraordinary removing—as on account of an irritancy.¹⁵² There is no indication in the statute, and little in the books, of what would be regarded as a reasonable period. Each case would be treated as a jury question. In one case a period of three months (3rd February to 15th May) was regarded as a reasonable time for the tenants of an extensive colliery to cede possession in an extraordinary removing, by closing their colliery engagements, disposing of surplus stocks of coal, dismissing servants, and valuing the plant which was to be taken over by the landlord.¹⁵³ Undue delay in removal of fixtures may lay the tenant open to an action of damages, but does not lead to a claim for violent profits.¹⁵⁴ A reasonable time may also be secured by stipulation.¹⁵⁵ But the truce comes to an end on the actual entry of the landlord or an incoming tenant.¹⁵⁶

¹⁴⁸ *E. Mansfield v. Blackburn*, 6 Bing. N.C. 426.

¹⁴⁹ *Penry v. Brown*, 2 Stark. 403; see a very special case of plate-glass front, *Haslet v. Burt*, 18 C.B. 162, 893.

¹⁵⁰ *West v. Blakeway*, 2 M. and G. 729, and cf. *Scott v. Ewart's Reps.*, *supra*, 138.

¹⁵¹ *R. v. Topping*, M'L. and Y. 544, 559 (*sed quære*).

¹⁵² *Amos and F.* 143; *Woodfall*, 644; and see *Martin v. Roe*, 7 E. and B. 237 (ecclesiastical dilapidations); *ex parte*

Brook, in *re Roberts*, 10 Ch.D. 101, 109, *per Thesiger*, L.J.

¹⁵³ *Houldsworth v. Brand's Trs.*, 1877, 4 R. 369.

¹⁵⁴ *Ibid.*; see *Laing v. Stephenson*, 1848, 11 D. 142.

¹⁵⁵ *Stansfeld v. Portsmouth Mayor*, 4 C.B.N.S. 120; *Sumner v. Bromilow*, 34 L.J.Q.B. 130.

¹⁵⁶ *Pugh v. Arton*, L.R. 8 Eq. 626; *Minshall v. Lloyd*, 2 M. and W. 450; *Mackintosh v. Trotter*, 3 M. and W. 184. See *Amos and F.* 102.

Natural ish.

If, on the other hand, a lease comes to its natural close, or to a termination which can be foreseen and provided for, it is probable, though in the absence of decision not certain, that apart from statute the English rule would be held to apply, and the tenant's right to remove fixtures be limited to his original term¹⁵⁷ 'and such further period of possession by him as he holds the premises under a right still to consider himself as tenant.'¹⁵⁸ This rule applies where the lease is brought to an end by surrender unless other provision is made therein,¹⁵⁹ but a purchaser of the fixtures from the tenant before surrender will be allowed a reasonable time for removal.¹⁶⁰

Mode.

The rules of the Agricultural Holdings Act that 'in the removal of any fixture or building the tenant shall not do any avoidable damage to any other building or any other part of the holding,' and that 'immediately after the removal of any fixture or building the tenant shall make good all damage occasioned to any building or other part of the holding by the removal' (sect. 30, provisoes 2 and 3) may be safely taken as embodying the common law obligation incumbent on the tenant. And if the fixture removed be a substitute for a landlord's fixture the latter must be restored or replaced with another of a similar description.¹⁶¹ But the tenant is not bound to put the premises so injured into perfect repair.¹⁶²

¹⁵⁷ *Ex parte Quincy*, 1 Atk. 477; *Lee v. Risdon*, 7 Taunt. 191; *Colgrave v. Dios Santos*, 2 B. and C. 76; *Poole*, 1 Salk. 368; *Meux v. Jacobs*, L.R. 7 H.L. 490.

¹⁵⁸ *Weeton v. Woodcock*, 7 M. and W. 14; discussed in *Leader v. Homewood*, 5 C.B.N.S. 546; *Gibson v. Hammersmith Ry.* 32 L.J. Ch. 337.

¹⁵⁹ *Fitzherbert v. Shaw*, 1 H.Bl. 258; *Heap v. Barton*, 12 C.B. 274; *Roffey v. Henderson*, 17 Q.B. 574; *ex parte Brook*, *supra*, ¹⁵².

¹⁶⁰ *Saint v. Pilley*, L.R. 10 Exch. 137.

¹⁶¹ *Amos and F.* 89; *Woodfall*, 645.

¹⁶² *Foley v. Addenbrooke*, 13 M. and W. 174.

CHAPTER XIV.

RENT.

THE rule that a reservation of rent is of the essence of a contract of lease has been already dealt with, and those qualifications of the rule set forth, which obtain in questions between the tenant and the lessor or his heirs,¹ and in questions between the tenant and the lessor's singular successors.² It now remains to examine the law of rent in its other aspects; and it may be a convenient division of a large subject to explain in the present chapter the nature of the tenant's obligation to pay rent, and the mode in which that obligation is discharged; in the next chapter, the time of payment, involving the law of terms or term-days and apportionment; and in the following chapter the remedies open to the landlord for enforcement of his correlative right.

In law, as distinguished from political economy, rent is the return, in money, produce, or other moveables, due by a tenant for the possession and use of the subject of a lease. As it is very doubtful how far the specific services, which may still be lawfully reserved in a lease³ are enforceable by means of the compulsitors which are available for enforcing the payment of rent, it will be the safer course to treat obligations dealing with such services (where and if they anywhere survive) as covenants or conditions of the lease.⁴ The only services which are commonly to be found in modern leases⁵—the furnishing of carriages in improving the obligant's farm—are unquestionably part of the rent. But where subjects are occupied by a servant during service, his occupancy is more properly regarded as part of his wages or

¹ *Supra*, p. 101.

² *Supra*, p. 129.

³ *Supra*, p. 130; 1 Geo. I. sess. 2, c. 54, sects. 10-14; 20 Geo. II. c. 50, sects. 21, 22.

⁴ They satisfy the requirement of rent, however, in 1449, c. 17; *supra*, p. 129—*e.g.*, an obligation to cart coals to the mansion-house.

⁵ See 1 Jur. Styles, 576 *et seq.*

remuneration than as held under a lease in which his services constitute the rent.

Due in virtue of stipulation. It is involved in the above definition that the rent must be due by stipulation.⁶ The term has, however, been somewhat loosely used in the Books as applicable to the consideration due to the owner of a subject by an occupant who cannot overcome by evidence the presumption that 'a party in possession is liable to pay the real worth of the subject occupied,' and that 'an occupant, though no direct obligation to pay rent is proved, is bound to pay the annual value of the subject, the onus lying on him to show that he got it for less or for nothing at all.'⁷ This rule was given effect to where there had been possession for years without written lease, and the *quantum* was fixed at the rent obtained both before and after the possession.⁸ The same mode of estimating the annual value was available and was adopted, where vendors of a mill, authorised by the purchasers to let it, and being unable to do so, took possession themselves, without consulting the purchasers and obtaining fresh powers, as they ought to have done.⁹ In one case, where there had been possession under a lease which was ultimately reduced, the stipulated rent was adopted as a reasonable consideration; but the terms of the report suggest (as is manifestly just), that this was no conclusive estimate of the annual value for the period of actual possession.¹⁰ In the most recent case the circumstances and the determination of the sum due for possession were too peculiar to be instructive as a precedent.¹¹

I. FORMS OF RENT.

Modes of payment. Rent is almost always payable in money. When the amount or part of it is a fixed sum set down in the lease itself, or a sum ascertained by remit to arbiters, the rent is in whole or part known as a money rent. If the obligation of the tenant is to deliver so much grain or other commodities, alone or in conjunction with a money rent, the prestation is in whole or part known as a grain rent, kain rent, or produce rent. If, in the third place, the contract goes to the destruction or removal of the subject let—as in the case of minerals—and the tenant is bound to deliver part of the subject he has dissevered, the prestation is

Money.

Grain : kain : produce.

Royalty : lordship.

⁶ *Brown v. Scott*, 1859, 22 D. 273; *Blair v. Galloway*, 1853, 16 D. 291 (see terms of interlocutor).

⁷ *Per L.J.-C. Moncreiff in Glen v. Roy*, 1882, 10 R. 239.

⁸ *Young v. Cockburn*, 1674, M. 11624.

⁹ *Wilson v. Pollock, Gilmour & Co.*, 1827, 6 S. 3.

¹⁰ *E. Fife v. Wilson*, 1864, 3 M. 323.

¹¹ *Glen v. Roy*, *supra*, 7.

known as a royalty or lordship. The produce rent or royalty deserves the name none the less, though the lease contains provisions whereby the payment in kind can be commuted according to a fixed tariff.

1. *Money Rent.*

The amount due may be either a sum ascertained in the lease,¹² or a sum ascertainable in a stipulated way. In the first case there is no difficulty. In the second case the ascertainment usually takes place by means of a reference. Thus, where a sublease was agreed on at a rent to be afterwards fixed by valuers, and before anything was done towards that end the sublessee offered to assign his right to a third party, it was held that this offer was no bar to his implementing the condition of his right by obtaining an award, which though pronounced before, was intimated to him after, his offer had been accepted.¹³ Probably in order to bind the sublessee and his assignee such an award, though merely on a reference to valuers and not on a submission to arbitration in the stricter sense of the word, would have to be probative, as inserting a clause into the sublease.¹⁴ If so, it may be gravely doubted whether the award in the case cited being informal could be cured by the cedent's payment of the sum fixed in it made at an interval after he had relinquished possession.¹⁵ In the absence of contrary stipulation, the tenant is at the risk of the delivery of the rent to the landlord or his known agent on the ground of the subjects let.¹⁶ If there be double distress, the tenant is liable only in once and single payment, and should throw the rent due into a multiplepounding.¹⁷

2. *Grain or Victual Rent, and Kain.*

The rent of agricultural subjects was at one time not uncommonly payable in kind—at so much grain of the different sorts produced on the farm, in lump quantity or per acre; provision being usually made in the lease itself or by subsequent agreement for converting the return into money, according to the fiars' prices for the year or for an average of past years, or according to some other known standard, within definite limits of maximum and minimum. The practice has yielded in great part to the inroads of the modern commercial conception of the relation of landlord and tenant, and has been in most cases superseded by the stipulation

Advantages
and disadvantages.

¹² In terms of the Coinage Act, 33 Vict. c. 10, sect. 6.

¹³ *Robertson v. Winans*, 1885, 12 R. 419.

¹⁴ *Diss. L. Young* in last case.

¹⁵ This is *L. Rutherford Clark's* view

of the case; but there was no valid objection to the award as too late.

¹⁶ *Cr. 2.3.37*; 1 *Bell, Leases*, 225.

¹⁷ *Cochrane v. Hamilton*, 1630, M. 2819.

of a money rent. Yet the older system enabled the two parties who were chiefly interested in the land to share equitably in the prosperity and adversity of what, in spite of modern notions, is in reality to a large extent a joint enterprise, liable, in an unusual degree, to fluctuations of fortune. So that it would be rash to anticipate that money rents shall ever become universal, and imprudent to omit all notice of victual rent. The minor prestations towards rent, at one time usual, and still surviving in some districts, consist of delivery of kain, kain-fowls (flying customs),¹⁸ custom-wethers, and fish. The amount frequently depends on usage; and conversion into money at a rate agreed on is generally for the interest of both parties.

Risk.

If there be no provision for conversion into money, and the landlord refuses to receive the victual rent when offered to him in due time, the tenant is liable only for the fiars' prices of the year; and if the grain perish by lying on his hands, the landlord must suffer the loss; but if the tenant do not offer his rent in kind, when bound to do so by his lease, he must account to his landlord according to the 'neighbouring' or 'selling' prices at the date when due, though exceeding the fiars;¹⁹ unless his failure to offer it arose from the pendency of negotiations for conversion.²⁰ Failure to deliver the rent grain timeously may involve liability for damages thereby entailed on the landlord.²¹ The question, whether the grain delivered must be the produce of the land or may be fair marketable grain of good quality obtained *aliunde*, will depend on the terms of the rent clause.²² It is a question of fact, which may be sent to a jury, whether in any case a grain rent has during the currency of a lease been altered into a fixed money rent, and whether the change is a permanent one, not merely an occasional abatement.²³

Sort of grain.

Commutation.

Weights and Measures Acts.

Under the Weights and Measures Act, 1824,²⁴ which had in view uniformity of calculation according to the imperial standards, and dealt with contracts, bargains, sales, and dealings for any work to be done, or for any goods, wares, merchandise, or other thing to be sold, delivered, done, or agreed for by weight or measure, it was conclusively settled on the principle of *ejus-*

¹⁸ See a case of feu-duty—*Hope v. Aitken*, 1872, 10 M. 347. These dues to a slight extent neutralised the fluctuations (which in modern times have become more important) in meat, and other produce besides grain.

¹⁹ *Barclay v. Simson*, 1682, M. 4413; *Ersk.* 2.6.40; *Bankt.* 2.9.27; *B. Pr.*

1205.

²⁰ *E. Elgin v. Wellwood*, 1825, 3 S. 422 (N.E. 296).

²¹ *Ersk.*, *supra*, 19.

²² *E. Elgin v. Wellwood*, *supra*, 20.

²³ *Baillie v. Fraser*, 1853, 15 D. 747.

²⁴ 5 Geo. IV. c. 74, now repealed except sect. 25, by 41 & 42 Vict. c. 49.

dem generis that a stipulation for rent by boll, firloft, and peck per Scotch acre let, was not struck at by the Act so as to enable the landlord to resile.²⁵ Further, the Weights and Measures Act, 1835,²⁶ which enacted (sect. 11) that 'a stone shall in all cases consist of fourteen standard pounds,' did not exclude proof that in calculating rent which depended on the price of cheese 'per stone according to the highest fiars of the county,' the tron weight of twenty-four pounds to the stone was intended by the parties—the view that was taken by two of the Judges at least being that the Act applied only to 'trafficking' in the commodity, not to the case under dispute.²⁷ The subsisting statute of 1878²⁸ substantially follows the phraseology of the Acts of 1824 and 1835. So that the same rules will still be applicable, though there may be a faint doubt whether the new provision that 'all tolls and duties charged or collected according to weight or measure' are to be regulated by the imperial standards, may not apply to rents (sect. 19).²⁹

3. *Royalty or Lordship.*

As has been already observed,³⁰ a lease of minerals in consideration of a rent is more properly a sale in consideration of a price payable by instalments. In entire consistency with this view it is usual to stipulate, either alone or as an alternative to a money rent, in the option of the landlord, for a certain portion of the produce, to be delivered in kind or convertible into money at the selling price at the hill, wharf, or place of delivery.³¹ Or, more

²⁵ *Henry v. M'Ewan*, 1832, 10 S. 572, aff. 7 W. and S. 411 (there was personal bar, but this element was not required for a decision).

²⁶ 5 & 6 Will. IV. c. 63, repealed by 41 & 42 Vict. c. 49.

²⁷ *Miller v. Mair*, 1860, 22 D. 660 (there were of course no fiars' prices for cheese, and there was no market price for it except by tron weight).

²⁸ 41 & 42 Vict. c. 49, sects. 19 and 14.

²⁹ Compare with this the phraseology of Act, 1824, sect. 15, and Act, 1835, sect. 15. The subject of fiars' prices belongs rather to local government law than to the law of leases (with which it has little connection in practice). It may be best studied in pamphlets by G. Paterson (*Histor. Acc. of Fiars*); W. Hector (*Fiars' Prices*); N. Elliot (*Position of Fiars' Prices*; *Conversion of Grain Pay-*

ments); and in Ersk. 1.4.6; 2 Hunter, 273; 1 Connell on Tithes, 431; Barclay, Dig. *sub voce*; and A.S.S., cases, reports, and returns therein mentioned.

³⁰ *Supra*, p. 67. See the use of the term in ascertaining the 'free yearly rent' of the Aberdeen Act (5 Geo. IV. c. 37), where the entailed estate contains minerals worked, in *Wellwood v. Wellwood*, 1848, 10 D. 1480, 11 D. 248; *Douglas v. Scott*, 1869, 8 M. 360; *Christie*, 1878, 6 R. 301; and in valuation for rates and taxes, *Mackintosh v. Playfair's Trs.*, 1841, 3 D. 893; *Valuation Act*, 17 & 18 Vict. c. 91, sect. 42; *Carron Co.*, 1864, 4 M. 1133; *Summerlee Iron Co.*, 1875, 4 R. 1146; *Kirkmabreck Heritors*, 1861, 24 D. 1456.

³¹ 1 Jur. Styles, 643. In coal, the proportion is usually one-fifth to one-tenth; lead and tin, one-sixth.

commonly, in lieu of the fixed money rent, at the landlord's option a lordship or royalty is reserved of so much money per ton of output, the rate being different for mineral of different intrinsic value.³² There is sometimes a further provision securing to the landlord a participation in the good or evil fortune of the mine or quarry by means of a sliding scale of royalty depending on the market price of the mineral won, raised, and carried off³³ from time to time.³⁴ To enable the landlord to check the accuracy of the amount of lordship offered or paid over to him, the duty is imposed on the tenant to keep regular and accurate books, entering into details of the working, keeping separate the output from the subjects let and the output from other lands;³⁵ to see to the accuracy of weighing; to exhibit the books, and to transmit accounts made up from them periodically.³⁶ The landlord sometimes reserves power to appoint a check-grieve or clerk to look after his interests. The coal used by the miners and in the pit is exempted from contribution.³⁷ The landlord is not barred from claiming arrears through having accepted the fixed rent for years owing to the erroneous nature of the tenant's returns.³⁸

Cases.

Not much light is thrown on the interpretation of these clauses by decided cases. The lease does not exclude proof of an alteration subsequently made in its terms by agreement between the parties, as, for example, with regard to the rate of conversion.³⁹ Rent is none the less liquid, and the right to it may none the less be enforced by diligence on the lease, though the amount has to be made out from the books in proportion to the output.⁴⁰ Though a lease does not particularise the amount of detail into which the periodical account must enter, an obligation will be inferred to afford such information—as to output, prices, and classes of mineral—as will enable the landlord to have an efficient check; and he is not understood to dispense definitively with demanding an account by neglecting to require periodical production of accounts for a considerable period of time.⁴¹

³² See 1 Jur. Styles, 608, 626, 656, 665, (shale), 679 (quarry).

³³ See *Waugh v. Russel & Son*, 1870, 7 Sc.L.R. 222.

³⁴ 1 Jur. Styles, 637, 665.

³⁵ See circumstantial case where the option as to each of two subjects let was preserved, though worked together, *Steuart v. M'Andrew & Co.*, 1850, 13 D. 434.

³⁶ 1 Jur. Styles, 612, 628, 646, 657, 666.

³⁷ *Ibid.* 613, 630, 644, 657, 667.

³⁸ *Simpson's Asylum Trs. v. Gowans*, 1874, 11 Sc.L.R. 309.

³⁹ *Carmichael v. Tait*, 1823, 2 S. 485 (N.E. 430).

⁴⁰ *Johnston v. Inglis*, 1832, 10 S. 260.

⁴¹ *Adam v. Napier*, 1843, 5 D. 736.

Where, as in the ordinary case, rent and royalty are stipulated for alternatively, it is not unusual to insert a clause conferring a power to make up shorts or short workings, whereby it is provided that, if the lordships be not so great as the fixed rent in any year, the deficiency may be made up in succeeding years; on the footing that in no year shall less than the fixed rent be paid.⁴² Making up shorts.

4. *Miscellaneous Prestations.*

Services have been already referred to. Customary fees or perquisites to barony-officers cannot be exacted where the obligation to pay them is omitted in a regular lease which deals with the tenant's liability for rent.⁴³ Herezelds (heriots) are obsolete.⁴⁴ The dues paid for stalls in public market-places are really rents, the amount of which is fixed by custom or statute.⁴⁵

II. DISCHARGE OF THE OBLIGATION TO PAY RENT.

This discharge may be brought about in various ways.

1. *Payment.*

(A) *Mode of Payment.*

Here the general rules relating to the extinction of obligations apply.⁴⁶ To operate extinguishment of the debt, payment should be made in full; by the debtor or some one on his behalf; to the true creditor, to his heir who has a title to discharge it, to some one on the creditor's behalf, as trustee, factor, &c., or to one who has been held out by the landlord as having authority to discharge the rent; and lastly, in the honest belief of this recipient's title to discharge. The last point—the doctrine of *bona fides*—deserves further notice. In full.
By debtor.
To creditor.

Though each case depends in a peculiar degree on its own circumstances when *bona fides* is in question, it may be useful to notice the cases which have occurred in practice. The tenant is entitled to pay rent to his landlord, who, though notoriously a traitor, is yet unattainted⁴⁷ down to the date of citation in a special declarator of escheat;⁴⁸ to a liferentrix in possession at the date of actual payment—her husband (to whom the rents In bona fide.

⁴² 1 Jur. Styles, 610, 627.

⁴³ Ogilvie v. Gruar, 1770, Hailes 364.

⁴⁴ See 2 Hunter, 285; Skene s.v.; Balf. 199; Cr. 2.8.32, 2.10.38; St. 2.3.80; Bankt. 2.3.172, 2.9.69; Ersk. 2.6.10, and cases M. 5407 seq.

⁴⁵ Thomson v. Boyd, 1824, 2 S. 735 (N.E. 674); Reid v. Edinburgh Mags., 6th Dec. 1810, F.C. 72; Kirkcaldy

Fleshers v. Mags., 1822, 2 S. 96 (N.E. 88).

⁴⁶ St. 1.18.3; Bankt. 1.24.5; Ersk. 3.4.1; B. Pr. 556; More's Notes, 124.

⁴⁷ Balmerinoch v. Durham, 1555, M. 1777.

⁴⁸ Blackburn v. Wilson, 1610, M. 1786; Cleghorn's Donatar v. Tenants, 1628, M. 1787.

would otherwise have gone, *jure mariti*) having died a rebel after the date when they became due ;⁴⁹ to a donatary before intimation was received by the tenant of an assignation by his rebel landlord to a third party ;⁵⁰ to an apparent heir (who let the land), before the tenant received intimation of a preferable right by infeftment ;⁵¹ to an apparent heir, his elder brother being supposed to be dead ;⁵² to the landlord in advance under a new arrangement made subsequently to the lease, but long before the question arose ;⁵³ to the landlord, after an interpellation by a creditor had been tacitly relinquished by *mora* ;⁵⁴ or to the lessor, who has sold his estate without the cognizance of the tenant.⁵⁵

Not in bond
fide.

Premature.

But payment has been held not to have been made *in bond fide*, when made to the landlord then in non-entry, after his superior had raised action against the tenants ;⁵⁶ when made capriciously and as an innovation on previous possession, though to a party infeft ;⁵⁷ or after citation in an action of maills and duties not relinquished by the pursuer.⁵⁸ In all questions with donataries, creditors doing diligence,⁵⁹ and singular successors of the landlord,⁶⁰ it is a note or mark of *mala fides* or collusion if payment have been made prior to the stipulated date of payment to the landlord,⁶¹ or his assignee,⁶² or certain creditors,⁶³ or his factor,⁶⁴ whether the competition which raises the question began before or after the payment.⁶⁵ There is no authority and there seems to be no reason in favour of the view⁶⁶ that the rule is relaxed if payment take place in the interval between the legal and the conventional term of payment.⁶⁷ The rule that forehead pay-

⁴⁹ *Stewart's Donatar v. Tenants*, 1624, M. 1778 (question reserved between donatar and liferentrix).

⁵⁰ *Kennoway v. Mowat*, 1638, 1 B.S. 102.

⁵¹ *McGill v. Crawford*, 1716, M. 1783.

⁵² *Fersie v. Burnett*, 1711, M. 1783.

⁵³ *York Buildings Co. v. Garden*, 1736, M. 1784 ; *Elch. B. and m. fides*, 2 (between legal and conventional terms).

⁵⁴ *Robertson v. Orme*, 1755, 5 B.S. 838 (citation in maills and duties, seven years) ; *Garden v. Lindsay*, 1757, 5 B.S. 855 (decree of maills and duties, fourteen months).

⁵⁵ B. Pr. 561.

⁵⁶ *V. Annand v. Elliston Tenants*, 1622, M. 1777.

⁵⁷ *Porterfield v. Cunningham*, 1629, M. 1781.

⁵⁸ *Home v. Kelloe Tenants*, 1666, 1 B.S. 522.

⁵⁹ But see op. of L. Kinloch in *Davidson v. Boyd*, *infra*,⁷⁰ ; but the doubt seems not to be justified.

⁶⁰ *Ly. Traquair v. Howatson*, 1667, M. 10024, 6221.

⁶¹ *Home v. Cairncross*, 1602, M. 10021 ; *Cleghorn v. Tenants*, 1628, M. 10022, 1 B.S. 249.

⁶² *Wilson v. Warrock*, 1611, M. 10022.

⁶³ *Wardlaw's Donatar v. Brown*, 1695, 1 B.S. 354 (bond).

⁶⁴ *Whittinghame v. Hatelie*, 1650, 1 B.S. 474 ; *Haggart v. Miller*, *infra*,⁶⁹.

⁶⁵ Ersk. 3.4.4.

⁶⁶ B. Pr. 562 ; 2 Hunter, 413.

⁶⁷ *Home v. Cairncross*, *supra*,⁶¹. The case of *York Buildings Co.*, *supra*,⁵³, proceeded on a change of system.

ment does not protect against a demand for payment over again does not hold where the land is in point of fact forerented;⁶⁸ or where the original payment was made to a factor according to an arrangement which was within the lines of good administration and was otherwise within the factor's powers to make;⁶⁹ or where the premature payment having been made to the landlord the demand for second payment is made by his bankruptcy trustee, who takes over the estate *tantum et tale* as the bankrupt had it.⁷⁰

(B) *Parties to whom and by whom Payment is Due.*

(1) *Right to Rents.*

The parties who are entitled to receive rents are the landlord, Landlord, &c. his heir and other representatives, according to rules which will be commented on in the following chapter;⁷¹ his creditors who have taken the proper steps by action or diligence;⁷² and his assignees to the rents. It falls to notice here only the position of such assignees.

The assignation which constitutes their title may be either a simple assignation to rents or part of a bond and disposition in security or other heritable bond. They are entitled in either case to pursue an action of maills and duties, and to take the benefit of hypothec where that security survives, for with the principal right passes the accessorial right to all competent remedies. The effect of such assignations cannot be better stated than in the words of Mr. Bell⁷³ :—‘ (1) Where the assignation is ‘ by personal deed, possession must be taken either by intimation ‘ or by decree of maills and duties, which proceeds on an action ‘ against the tenant founding on the assignation and concluding ‘ for decree adjudging the rents to be paid to the assignee. ‘ Erskine⁷⁴ denies that such assignations have effect against ‘ singular successors, and his doctrine seems to be law. (2) ‘ Where the conveyance is by disposition or heritable bond, ‘ the sasine is a sufficient completion of the creditor's right to ‘ the rents, upon this principle that the rents are an accessory ‘ of the real right to the lands. The same principle leads to this ‘ consequence that personal assignations of rents, though effectual ‘ while the feudal right continues in the cedent or common ‘ debtor, lose their force when the real right is transferred to

Assignees to
rents.

⁶⁸ *E. Lauderdale v. Swinton Tenants*, 1662, M. 10023.

⁶⁹ *Haggart v. Miller*, 1838, 16 S. 1058.

⁷⁰ *Davidson v. Boyd*, 1868, 7 M. 77 (paid 29th Oct., sequestration 9th Nov.).

⁷¹ *Infra*, p. 304.

⁷² See *supra*, p. 44.

⁷³ 1 B.C. 757.

⁷⁴ *Ersk.* 3.5.5.

'another. The purchaser of lands, therefore, or an heritable creditor completing a real right to the lands carries the rents in competition with assignations, however completed. The only security over rent, effectual against sasine in the lands, is one which is not confined to the rents themselves, but takes them as an accessory to the feudal right.'⁷⁵

Intimation. Apart from questions between assignees to rents and creditors,⁷⁶ it has been decided that mere intimation of an assignation to the tenant does not make the assignee liable to account for rents if he does not proceed actually to uplift them;⁷⁷ though it interpellates the tenant from paying to the cedent the rents due to him,⁷⁸ unless it is departed from expressly or tacitly as shown by the conduct of parties.⁷⁹ The assignation carries all future rents while matters remain unchanged, and it is no objection to its completion that intimation was made to the tenants at a date when nothing was actually payable by them.⁸⁰ If there be a dispute as to the validity of an assignation, the proper course is for either party pending an action of reduction to get the rents thrown into a multiplepounding, but if, instead of that the assignee arrests rents in the tenant's hands, the cedent (or his successor) cannot obtain a loosing of arrestment, since the assignee's title is still unreduced.⁸¹

Arrestment.

(2) *Parties under Obligation to Pay.*

The position of the lessee, his heirs, representatives, and assignees has been already examined. It is only necessary to add in this place that 'the liability for rent follows the right to the privileges which the lease confers,' unless the contrary be expressly provided.⁸²

(c) *Discharge. Proof of Payment.*

The discharge may be either express or tacit.

(1) *Express Discharge.*

This does not require to be proved by a probative writing; the

⁷⁵ *Hamilton v. Alexander*, 1622, M. 2813; *Kelgour v. Thomson*, 1628, 1 B.S. 245; *Huntly v. Hume*, 1628, M. 2764, 2814; *Ly. Borthwick v. Catkune Tenants*, 1632, M. 2815; *Morison v. Orchardton Tenants*, 1635, M. 2815 (with which cf. *Samuel v. Samuel*, 1627, M. 2813); *E. Loudon v. Ross*, 1734, M. 2818; *E. Buchan's Creds. v. E. Cardross*, 1741, Elch. Competition, 6; *Webster v. Donaldson*, 1780, M. 2902.

⁷⁶ See *supra*, p. 44.

⁷⁷ *Garden v. Lindsay*, 1757, 5 B.S. 855.

⁷⁸ *Hope v. Wauch*, 12th June 1816, F.C. 170; *Bruce v. Buchan*, 1684, M. 12609.

⁷⁹ *Balfour v. Lyle*, 1833, 10 S. 853, 11 S. 906, aff. 2 S. and M'L. 1.

⁸⁰ *Flowerdew v. Buchan*, 1835, 13 S. 615; *Hope v. Wauch*, *supra*, ⁷⁸ (therein differing from arrestment).

⁸¹ *Crawford v. Ritchie*, 1837, 16 S. 107.

⁸² See *Burns v. Martin*, 1885, 12 R. 1343, rev. 14th Feb. 1877, *supra*, p. 155.

subscription of the landlord⁸³ or of a person duly authorised by him to grant discharges⁸⁴ being sufficient authentication. This is so, even in a question with singular successors of the landlord, if the discharge was granted *debito tempore*—before intimation.⁸⁵ It was even at one time held that on account of the rusticity of tenants a discharge was sufficiently instructed by a fitted account written but not subscribed by a factor and by him delivered to the tenant;⁸⁶ or by a factor's holograph account-book though neither subscribed, nor delivered, nor regularly kept;⁸⁷ but it is thought that the only mode of using these documents now-a-days would be by putting them before the party in a reference to his oath. A subscribed docquet approving the old tenant, indorsed on the scroll of a new lease on which possession was never taken, is no discharge of rent due under the old lease.⁸⁸ It will in every case be a matter of construction whether a discharge be general or only applicable to specified items in account,⁸⁹ or whether a general discharge (of all debts) granted by a landlord to his tenant will include rents.⁹⁰ Where the lease is constituted by writ, payment of rent under it can only be proved by writ or oath,⁹¹ unless it take the form of delivery of produce in kind,⁹² or of a transaction involving such delivery,⁹³ which is proveable *prout de jure*; and the rule applies though the term's rent be less than £100 Scots,⁹⁴ or the claim be restricted to that amount.⁹⁵ The oath on reference is subject to the usual rules as to qualifications extrinsic and intrinsic.⁹⁶ Thus, in order to bring in an alleged agreement to allow counter-claims in extinction of rent, there must be proved something more than an

⁸³ *Schaw v. Tenants*, 1667, M. 16966; *Preston v. Scott*, 1667, M. 11397, 16967; *Boyd v. Storrie*, 1674, M. 12456, 16968; *Glendinning v. Glendinning*, 1685, M. 9213; *A. v. Cunningham*, 1684, 2 B.S. 66.

⁸⁴ See *Holburn v. Mayne*, 1687, 2 B.S. 109.

⁸⁵ *Bruce v. Buchan*, *supra*, 78.

⁸⁶ *Ainsly v. Chisholm*, 1696, M. 12626.

⁸⁷ *Watson v. Brown*, 1710, M. 12628; and see the very special case, *Mitchell v. Berwick*, 1845, 7 D. 382.

⁸⁸ *Pentland v. Scott*, 1829, 7 S. 502, aff. 5 W. and S. 28.

⁸⁹ *Ms. Tweeddale v. Hume*, 1848, 10 D. 1053.

⁹⁰ *Balf.* 156; *St.* 1.18.2; *Bankt.* 1.24. 19; *Ersk.* 3.4.9. *Cr.* 2.10.7 is unsup-

ported. As to the discharge of additional pactional rent see *infra*, in chap. xvii. the cases of *Hunter v. Broadwood*, 1854, 16 D. 441; *Baird v. Mount*, 1874, 2 R. 101.

⁹¹ 1 *Dickson on Evid.* § 606; *Romano v. Nisbet*, 1609, M. 12355; *Job v. Ker*, 1624, 1 B.S. 21; *Dawling's Bairns v. Balmerinoch*, 1627, M. 12407; and see *A. B.*, 1634, M. 12397.

⁹² *Bennet v. Foulden*, 1629, M. 12360; *Agnew v. Agnew*, 1687, M. 12364; *E. Lauderdale v. Tenants*, 1662, M. 10023, 12362.

⁹³ See *Mitchell v. Berwick*, 1845, 7 D. 382; 1 *Dicks.* § 587.

⁹⁴ See 1 *Dicks.* § 606.

⁹⁵ The case of *E. Lauderdale*, *supra*,⁹², was probably one of verbal lease. See *Tait, Evid.* 335; 1 *Dicks.* 611.

⁹⁶ 2 *Dicks.* 1647 *et seqq.*

intention, hint, or half-promise by the landlord, and an understanding on the part of the tenant.⁹⁷ There is the additional statutory requirement that if the rent paid amount to £2 or upwards a receipt stamp for one penny must be on the document when given and be cancelled, or be added within a month on payment of penalties.⁹⁸ Where the lease is verbal, payment of rent may be proved by parole, if the sum do not exceed £8, 6s. 8d.; if it be more, the proof is limited to writ or oath.⁹⁹

(2) *Tacit Discharge.*

The maxim, called somewhat inaccurately the rule of the *apocha trium annorum*, presumes out of favour to rusticity, or as the result of experience in business, from three discharges for consecutive termly payments, *inter alia*, of rent, that all preceding rents have been paid.¹⁰⁰ The discharges must be in writing;¹⁰¹ granted either by the landlord or, as is now established, by his factor empowered thereto,¹⁰² or, probably by third parties holding the landlord's order to receive the rents.¹⁰³ The payment must be periodical—annual and half-yearly terms being the most usual. Though there is no authority, it seems reasonable to suppose that quarterly receipts or even vouchers of shorter periods would also be available. The presumption does not apply to grassums or to rents different in kind from those expressed in the discharges,¹⁰⁴ nor to one discharge or two discharges, but only to three separate discharges, for three consecutive terms;¹⁰⁵ nor if any of the discharges is only partial, and is not supplemented by an acquittance for the balance for that term.¹⁰⁶ It would seem that, though a term's rent paid in full by instal-

From three consecutive receipts.

⁹⁷ *Hunter v. Kinnaird's Trs.*, 1830, 9 S. 154. *Heddie v. Baikie*, 1847, 9 D. 1254, is a case of lease which illustrates procedure only.

⁹⁸ 33 & 34 Vict. c. 97, sects. 120 *seq.* and schedule.

⁹⁹ A.S., 15 June 1597; Ersk. 4.2.21; Tait, Evid. 336, 1 Dicks. § 611; E. Lauderdale v. Tenants, *supra*,⁹².

¹⁰⁰ Balf. 153; Cr. 3.6.12; St. 1.18.2; Mack. 3.4.4; Bankt. 1.24.13; Ersk. 3.4.10; B. Pr. 567, 585; Tait, Evid. 470; 2 Bell, Leases, 22; 2 Ross' Lect. 401; Dickson, Evid. § 384. The rule applies to other periodical payments.

¹⁰¹ L. Morriston v. E. Nisbet Tenants, 1631, M. 11394, overruling Kennedy, 1622, M. 11393.

¹⁰² Assumed in D. Buccleuch v. M'Turk,

1845, 7 D. 927, after fluctuation in the earlier cases—Wedderburn v. Nisbet, 1612, M. 6322, 7181; Preston v. Scott, 1667, M. 11397; Blaccadder v. Cockburn, 1687, M. 3552, 3 B.S. 648. In E. Marischal v. Fraser, 1682, M. 3551, 11399, the point did not arise purely.

¹⁰³ In Corstorphine v. Tenants, 1636, M. 11396, the discharges did not *ex facie* apply to the years following those for which the rent was claimed.

¹⁰⁴ Ly. Errol v. Cruickshanks, 1605, M. 11392.

¹⁰⁵ Forrester's Exrx. v. L. Dreddon, 1544, M. 11392; Morriston, *supra*,¹⁰¹, overruling Wemyss v. St. Colme, M. 11391, and Wedderburn v. Nisbet, *supra*,¹⁰².

¹⁰⁶ L. Rosyth v. Wood, 1631, M. 11395 (though balance is judicially tendered).

ments may be held equivalent to a term's rent paid in lump,¹⁰⁷ yet dribblets of payment, not appropriated to any particular term, yet amounting in the aggregate to full payment for the three terms will not infer the presumption.¹⁰⁸ Provided that the discharges were granted by the same landlord or, if by successive landlords, by the later granters in knowledge of the earlier acquittances,¹⁰⁹ the sounder view seems to be that it does not matter whether they were granted to the same tenant or to successive tenants.¹¹⁰ Where a bill or promissory note for rent due remains in the hands of the landlord undischarged, the presumption that it has not been paid is stronger than the presumption from three subsequent discharges;¹¹¹ some further proof of release is required to neutralise the bill or note, such as an express discharge of all bygones,¹¹² or great delay, and discharge in a sequestration or general accounting.¹¹³ A decree or bond constituting arrears of rent is similarly beyond reach of the *apocha*.¹¹⁴ So that the presumption is not conclusive; it can be redargued by contrary presumption; or by the debtor's writ or oath;¹¹⁵ or by the terms of the receipts if they reserve claims for arrears. There is a converse presumption in favour of the creditor in a periodical payment when repetition of rent due prior to three discharges is demanded on the ground of double payment.¹¹⁶

(3) *Prescription.*

(a) Certain house-rents are subject to the triennial prescription. The words of the Statute 1579, c. 83 (so far as in point), are: 'All actionis of debt for house-maillies that are not founded upon written obligationis be persewed within three zeirs, uthewise the creditor sall have na action, except he outhier preife be writ or be aith of his partie.'¹¹⁷ There is no exemption in favour of minor landlords.¹¹⁸ The Act does not protect

Triennial prescription.

¹⁰⁷ Obs. in *Blaccadder v. Cockburn*, *supra*,¹⁰²; cf. *Hunter v. L. Kinnaid's Trs.*, 1829, 7 S. 548, which was, however, less a case of the *apocha* than of express discharge, the receipts produced being for the *balance* of the tenant's rents.

¹⁰⁸ The obs. in *More's Notes*, 123, seems sound to this extent.

¹⁰⁹ *Gray v. Reid*, 1699, M. 11399.

¹¹⁰ *Williamson v. Balgillo*, 1631, M. 11393 (stipend), is later than *Ly. Errol v. Cruickshanks*, 1605, *supra*,¹⁰⁴.

¹¹¹ *Pringle v. Murray*, 1760, M. 1639, 11403; *Patrick v. Watt*, 1859, 21 D. 637; *More's Notes*, 123.

¹¹² *Home v. Anderson*, 1744, M. 11401.

¹¹³ *D. Buccleuch v. M'Turk*, 1845, 7 D. 927.

¹¹⁴ *Grant v. M'Lean*, 1757, M. 11402.

¹¹⁵ *Cockburn v. Steuart*, 1669, M. 11398; *St. 1.18.2*; *Ersk. 3.4.10*.

¹¹⁶ *Reid v. Ogilvie*, 1729, M. 11400 (annualrent).

¹¹⁷ *St. 2.12.30*; *Mack. 3.7.7*, Obs. *in loc.*; *Bankt. 2.12.27*; *Ersk. 3.7.17*; 1 B.C. 331; B. Pr. 628; *Tait, Evid. 456*; 1 *Dickson*, § 493; *Napier, Prescription*, 714.

¹¹⁸ *Ibid.*

tenants of rural tenements,¹¹⁹ but probably extends to all urban tenements.¹²⁰ Each term's rent runs a separate course from the date of payment, the tenant's removal having nothing to do with the commencement of the prescriptive period.¹²¹ A receipt for rent, dated prior to the triennial period, confirms rather than contradicts the presumption of payment.¹²² The writ, by production of which the prescription is elided, would probably not require to be a formal acknowledgment of indebtedness. Mere absence of entry of payments of rent in the tenant's books is irrelevant, except to show that no such writ exists.¹²³ The oath which elides prescription must be emitted by the tenant himself, not by a manager for him, however exclusive his management may have been.¹²⁴ It may be argued, on the terms of the Act and with the help of some authority, that the same strictness would not be required in the admission of writ;¹²⁵ but the sounder view seems to be that the same rule must be applied to both.¹²⁶ In all cases the constitution and the subsistence of the debt must both be proved by writ or by oath, or by writ as to either of them, and oath as to the other,¹²⁷ except in so far as the necessity for proof is dispensed with by judicial admission.¹²⁸ If the tenant who was originally liable dies, the reference, if taken, must be made to the oath of his heir; and both elements must be made out, without distinction as to the date of the ancestor's death, during or after the currency of the triennial period.¹²⁹

Quinquennial
prescription.

(b) By the Scots Act 1669, c. 9, it is enacted that 'mails and duties of tenents, not being pursued within five years after the tenents shall remove from the lands for which the mails and duties are craved, shall prescribe in all time coming; except the saids . . . mails and duties shall be offered to be proven to be due and resting-owing by the defenders their oaths or by a speciel writ under their hands acknowledging what is resting-owing;' and that all actions for mailles and duties 'shall prescribe within ten years except the saids actions shall be wakened every five years.'¹³⁰ Shorter prescriptions are saved; and

¹¹⁹ *Ross v. Fleming*, 1627, M. 12735.

¹²⁰ In the sense explained, *supra*, p. 159.

¹²¹ *Ersk.*, B.C., B. Pr., Dicks., Napier, *supra*, ¹¹⁷; *Ferguson v. Muir*, 1737, M. 11103.

¹²² *Cumming's Trs. v. Simpson*, 1825, 3 S. 545 (N.E. 377).

¹²³ *Ibid.*

¹²⁴ *Bertram & Co. v. Stewart's Trs.*,

1874, 2 R. 255, and cases there.

¹²⁵ *Smith v. Falconer*, 1831, 9 S. 474.

¹²⁶ As to the wife's prepositura, see *Fraser H. and W.* 628; B. Pr. 1566.

¹²⁷ *Deans v. Steele*, 1853, 16 D. 317 (account).

¹²⁸ *Ritchie v. Little*, 1836, 14 S. 216.

¹²⁹ *Cullen v. Smeal*, 1853, 15 D. 868.

¹³⁰ Amended as to this by 1685, c. 14.

minorities deducted.¹³¹ The statute may be pleaded by a tenant or his cautioner¹³² or by a subtenant;¹³³ under a lease either written or verbal¹³⁴ of a tenement either rural or urban;¹³⁵ but not in an action of intrusion;¹³⁶ nor by a tenant in a lease of rents, or of an estate which is wholly or mainly occupied already by sitting tenants,¹³⁷ since, there being no natural possession, there could be no removal from the lands—the necessary *terminus a quo*.¹³⁸ The removal need not be regular; absconding is a sufficient commencement of the period.¹³⁹

The modes in which the prescription may be elided are the same as under the earlier statute.¹⁴⁰ It is excluded only if the rents have been 'pursued' within the period. Therefore it is not excluded by partial payments made within that period, for these rather tend to fortify the presumption that all bygones have been paid;¹⁴¹ nor by diligence such as sequestration for rent, or arrestment in security if not proceeded with after the removal;¹⁴² but it is barred by a sequestration which is followed forth after that event;¹⁴³ by a judicial demand during the five years;¹⁴⁴ or by the fact, brought out in an action brought by the tenant for improvement compensation, that the rents had been retained by him to set off against this claim.¹⁴⁵

(4) *Compensation.*

Another answer to a claim for rent is compensation or set-off. Compensation. The nomenclature of our law in this department is by no means clear; but it seems on the whole the most expedient course to confine the term to the class of cases contemplated in the Scots Act, 1592, c. 143; and to bring together under the head of

¹³¹ St. 2.12.32; Mack. 3.7.11, and Obs. *in loc.*; Bankt. 2.12.5; Ersk. 3.7.20; B. Fr. 634; Tait, Evid. 544; 1 Dickson, § 465; Napier, Prescription, 813.

¹³² Doull v. Holmes, 1695, M. 2077; Duff v. Innes, 1771, M. 11059.

¹³³ Daes v. Scougall, 1710, M. 11056.

¹³⁴ Lyle v. Crichton, 1694, 4 B.S. 153; Nisbet v. Baikie, 1729, M. 11059.

¹³⁵ Boyes v. Henderson, 1823, 2 S. 190 (N.E. 169).

¹³⁶ Robertson v. M'Intosh, 1688, M. 11053.

¹³⁷ Nisbet v. Baikie, *supra*,¹³⁴ contrasted with Fairholm v. Livingston, 1725, M. 11058; Ersk. 3.7.20, and see *supra*, p. 122 under the Act 1449. Murray v. Trotter, 1709, M. 11054, seems to have been of this sort and to be a good deci-

sion, though doubted by Mr. Hunter, 2, 436.

¹³⁸ Strahorn v. Cunningham, 1739, M. 11059.

¹³⁹ M'Intosh v. Baillie, 1753, Elch. Notes, Prescription, 35.

¹⁴⁰ See authorities in note ¹³¹.

¹⁴¹ Nisbet v. Baikie, *supra*,¹³⁴.

¹⁴² Cochran v. Fergusson, 1830, 8 S. 324.

¹⁴³ Hogg v. Low, 1826, 4 S. 702 (N.E. 708).

¹⁴⁴ M'Donald v. Jackson, 1826, 5 S. 28 (N.E. 26).

¹⁴⁵ Nicolson v. M'Alister's Trs., 1832, 10 S. 759; cf. M'Intosh v. Baillie, *supra*,¹³⁹.

See a very special case of extrinsic and intrinsic in Heddle v. Baikie, 1847, 9 D. 1254.

Retention.

Retention the cases in which a tenant is entitled to refuse payment of rent, in respect of a counter-claim, without being able to appeal to the statute. For, though retention applies, strictly speaking, to corporeal subjects only, the term has been usefully extended to the retention of debts, and, *inter alia*, of rents.¹⁴⁶ Of the two, retention, as thus understood, is much the more important; compensation may be dismissed in a few sentences.

1592, c. 143.

The words of the statute are that 'ony debt *de liquido in liquidum* instantly verified be writ or aith of the party before ' the giving of the decreete be admitted be all judges within this ' realme be way of exception; bot not after the giving thereof ' in the suspension or in reduction of the same decreete.' It would be out of place to re-examine the rules which a construction of this Act has now established.¹⁴⁷ It will be enough to point out how far these rules are illustrated by the law of leases.

Parties.

With regard to the parties who can plead compensation, (a) it is trite law that they must be debtor and creditor to each other. Therefore, if an adjudger or annual-renter who is infest claims rent, the tenant cannot plead in compensation a debt due to him by the landlord against whom the adjudication had been led,¹⁴⁸ or whose title was burdened with the bond.¹⁴⁹ The compensation is good as to bygones for these might and should have been paid to the landlord (his debtor), but not as to rents due after the date of citation.¹⁵⁰ An assignee to rents is entitled to bear away rents due after intimation of his assignation in the face of a counter-claim by the tenants against the landlord;¹⁵¹ and an arrester those due after the date of the arrestment.¹⁵² As a factor who lets a subject for his constituent cannot set off the rent due under the lease against his own debt to the tenant;¹⁵³ so conversely a tenant cannot compensate a claim for rent by alleging a debt due by his landlord's factor. A landlord having died insolvent the tenant was entitled to set the rent against a

¹⁴⁶ B. Pr. 1410.

¹⁴⁷ See St. 1.18.6; Bankt. 1.24.23; Ersk. 3.4.11; Pr. 3.4.2; 2 B.C. 118, 553; B. Pr. 572.

¹⁴⁸ Clark's Crs. v. Dewar, 1697, M. 2656.

¹⁴⁹ York Buildings Co. v. Buchan, 1733, M. 2660.

¹⁵⁰ Elmslie v. Grant, 1830, 9 S. 200, overruling York Buildings Co., *supra*,¹⁴⁹.

¹⁵¹ L. Bowhill v. Jackson, 1709, M. 2612.

¹⁵² Miller v. Meldrum, 1756, M. 2618 (counter-claim was for a double payment of rent); Anderson v. Gordon, 1703, M. 4031, is not now law.

¹⁵³ Ferguson v. Muir, 1711, M. 2659 (though rent taken payable to factor *nominatim*).

debt due to him before the date of the death but not a bill due by the deceased to a company of which the tenant was partner and endorsed to him after that date.¹⁵⁴

(b) The debts must be of the same nature and quality. Debts of same quality. Therefore a grain rent, not convertible, would not be capable of being set off against a money debt;¹⁵⁵ and an absolute and pure debt 'already payable cannot be compensated with a conditional debt or one whereof the term of payment is not yet come.'¹⁵⁶

(c) The debts must both be liquid or capable of being liquidated at once.¹⁵⁷ Thus an illiquid claim for the value of melio- Liquid. rations will not be allowed as a reply to a demand for rent,¹⁵⁸ unless the objection be waived.¹⁵⁹ The rule may be enforced against the landlord; as, for example, if he is liable for the prices of stock at outgoing and the value is not yet ascertained in the stipulated mode.¹⁶⁰

Compensation does not operate unless it is pleaded: when pleaded it operates as *ipso facto* extinction of the mutual debts so far as they correspond.

(5) Retention.

Rents may be retained in circumstances which do not give rise to the plea of compensation under the statute, if either (a) the landlord is bankrupt or insolvent; or (b) the landlord refuses or delays performance of some material part of his obligations under the lease.

(a) The former sort of retention is part of the law of balancing Balancing accounts in bankruptcy. accounts in bankruptcy,¹⁶¹ and proceeds on the ground of the injustice of demanding payment in full of a liquid debt due to a bankrupt, while leaving the other party only a right to a dividend on his counter-claim in the bankrupt's sequestration or *cessio*. The debt thus set off against the rent must be such as is capable of being ranked for; and there must have been a concurrence of debit and credit existing prior to the date of the landlord's bankruptcy.¹⁶²

¹⁵⁴ *Cauvin v. Robertson*, 1787, M. 2581.

¹⁵⁵ *Elliot v. Elleis*, 1631, M. 2649; *Tullialan v. Crawford*, 1664, M. 2559; *Ersk.* 3.4.15.

¹⁵⁶ *Ersk.* *ibid.*

¹⁵⁷ *Hamilton v. M'Carteney*, 1611, M. 2631; *Simpson v. A.*, 1628, M. 12450, 13240; *Dun v. Craig*, 1824, 3 S. 274 (N.E. 193); *Mowat v. Denham*, 1828, 7 S. 88; *Johnston v. Inglis*, 1832, 10 S. 260, and other cases in the following section,

¹⁵⁸ *Hodge v. Brown*, 1664, M. 2651; *Johnstone v. Cleghorn*, 1824, 2 S. 688 (N.E. 579).

¹⁵⁹ *Blair v. Robson*, 1822, 1 S. 470 (N.E. 438). See case of actual payment by the hand of a third party, *Clark v. Dallas*, 1711, M. 13213.

¹⁶⁰ *Macrae v. Gordon*, 1842, 4 D. 1310.

¹⁶¹ 2 B.C. 124; *Goudy, Bankruptcy*, 539; see *Thomson v. Jameson*, 1830, 9 S. 168.

¹⁶² 2 B.C. 129; *Goudy*, 542.

In determining questions arising under the latter rule, it must be observed that, unless there be stipulation to the contrary, the continuing obligation to pay rent during the currency of the lease does not enter as an element into the concurrence; but each term's rent becomes a debt only when the term is current and cannot therefore be set off by the tenant till it is due, so that there can be no compensation except for arrears¹⁶³ due, in the case of sequestration of the landlord, at the date of the first deliverance, and in the case of a *cessio*, at the date of the decree.¹⁶⁴ Even if there be an express stipulation that the tenant shall have right to retain rent against debt, the publication of the sequestration, *cessio*, or other form of divestiture is probably as much an interpellation as an arrestment or the intimation of an assignation of rents.¹⁶⁵ Of course, if the tenant has a preference for his claim, by adjudication or otherwise, over the other creditors and the trustee in bankruptcy, he is entitled to retain the rents until his debt, principal and interest, is fully paid.¹⁶⁶

Retention
apart from
bankruptcy.

(b) The second sort of retention is part of the law of mutual obligations. 'In mutual contracts, the counter engagements of the parties meet and oppose each other; and unless credit is stipulated or given, the performance of the one engagement is conditional of the performance of the other.'¹⁶⁷ A lease being a mutual contract, this rule ought, if strictly applied, to take this special form in the present relation—viz., that the tenant shall not be obliged to pay and may retain the rent due by him if the landlord has not and till he has performed his part of the contract. A study of the cases which have arisen during two centuries of our law makes it plain that the operation of this rule of equity has been restrained by two considerations, one of them improperly, the other quite justly, given effect to. The law of compensation, as above explained, has been allowed to influence the decision of cases to which it had no proper application, as being a mode of extinguishing, not of enforcing an obligation. And a lease is a continuing contract subsisting, it may be, for a long period of time, and not like a sale and other transient bargain, in which the right of retention or lien finds its chief

Different from
compensation.

Effect of lease
being a con-
tinuing con-
tract.

¹⁶³ 2 B.C. 139.

¹⁶⁴ 19 & 20 Vict. c. 79, sects. 42, 102; 43 & 44 Vict. c. 34, sect. 9. As to the effect of mere insolvency or notour bankruptcy of the landlord, see Ersk. 3.4.18; 2 B.C. 129; Goudy, 543.

¹⁶⁵ 2 B.C. 139; see Auchinbreck's Creds. v. M'Lauchlan, 1748, M. 1736;

Elch. Tack, 14; Martin v. Marshall, 12 D. 1172.

¹⁶⁶ Campbell v. Welsh, 1785, 3 Pat. 32.

¹⁶⁷ 2 B.C. 97. See also B. Pr. 71; More's Notes, 131; St. 1.18.7; Ersk. 3.4.21; see Dickens v. Kerr, 1824, 2 S. 768 (N.E. 638).

illustration. This appears to be a legitimate consideration, since there is usually ample security in the tenant's right of possession for the performance of the landlord's obligations, however material to the tenant's interest these may be; but this security dwindles towards the close of a lease. A distinction, not easily maintained in logic, but none the less useful in practice, arises out of the different nature of certain of the landlord's obligations. If there be failure on his part to fulfil in any material degree his cardinal duty of giving possession and maintaining the tenant in possession, the right of retention may be regarded as absolute. If, on the other hand, the obligation which is broken or unfilled is merely collateral to this principal obligation, the tenant's equity is not so apparent.

Baron Hume¹⁶⁸ attempts an exposition of the law regarding the enforcement of such collateral obligations by the retention of rent; and his words are worthy of citation, not as having been expressly recognised by the Court, but on account of their apparent reasonableness. The illustration he adduces is the ordinary one—an obligation in the tack to build houses or enclose land. 'It must always be considered that the tenant has in the meanwhile the exclusive use of the land (though perhaps less advantageously) and reaps the whole fruits (though perhaps less plentiful), and thus in the main has performance made him by the landlord. To let him retain the rent of successive years, or as much of these as he may choose to claim at a venture, would, in the circumstances, be unjust to the landlord.' The rules then suggested by him may be summarised thus:—(1) If there be apparent a just ground of complaint, retention should be restricted to the probable amount of damages, if they can be estimated. (2) If the tack does not set forth explicitly the plan [mode] or time of performance, there should be a timeful and urgent demand of implement, through a notarial instrument or the like, accompanied with exhibition of a plan. (3) If the damages are illiquid, and the claim frivolous, or at best doubtful; and if the tack be still current for a series of years 'the plea of retention shall be admitted with more difficulty, and be confined within narrower bounds.' (4) The plea is 'more favourable where it is applied towards the issue only of the tack and to the rent of the last year, supposing always that the ground of claim has arisen recently, or, if it be older, that the tenant has been duly and seriously urgent for it in former years.'¹⁶⁹

¹⁶⁸ In *Bowie v. Duncan*, 1807, Hume 839.

¹⁶⁹ In another department of the law. the exceptions to this rule of mutual obli-

Where right of
possession
infringed.

(a) It is now established that a tenant is entitled to retain his rent, if and so long as the landlord fails to put or maintain him in possession of a material part of the subject let.¹⁷⁰ Thus, in the face of a decree for rent the tenant was allowed a proof of damage caused by his being deprived of the use of a barn which the landlord pulled down when filled with corn, and by being prevented from tilling land to which manure had been led; the ground of the judgment being that 'tenants could not be obliged 'to pay their rents where they had clear grounds of retention 'on account of damages arising from the very subject by which 'they were to pay their rent, though they could not instantly 'verify them, as consisting *in facto*.'¹⁷¹ In a lease of fishings, a tenant was held to be justified in retaining his rent on the ground of injury (alleged and *prima facie* instructed) through the building of a ship-dock at the chief fishing-station.¹⁷² And where the tenant of a mill withheld his rent on the ground that his landlord had allowed a conterminous heritor to divert water from it so as to diminish the available water-power, no question was raised either at the bar or on the Bench as to the tenant's right to withhold if the facts were as alleged; and the case went to a jury.¹⁷³ A gas company let ground adjoining their works 'with right to the whole of the ammoniacal liquor and the tar 'which shall flow into the tenant's cistern, produced and arising from the company's works.' In a sequestration for rent, the tenant averred that the company wilfully obstructed these substances in their passage; but failed to prove any amount of specific loss arising from that cause. There was no doubt, however, on the Bench that, if the facts had stood otherwise, there would have been a sufficient defence.¹⁷⁴ 'The landlord is as 'much bound to put and continue the tenant in possession, as far at 'least as his own action is concerned, as the tenant is to pay his 'rent. . . . If the lessor by his own act withhold from the tenant 'the whole or any material part of the subject of the lease the 'tenant may resist payment to the extent, at least, of what he

gations are by L.J.-C. Moncreiff classed as due (1) to the special nature of the contract; (2) to the incidental or accidental character of the stipulation; or (3) its insignificance; *Turnbull v. M'Lean*, 1874, 1 R. 730, 738. The cases in other departments are collected in B. Pr. 71 (8th ed.).

¹⁷⁰ See *supra*, p. 200.

¹⁷¹ *Buchan v. Leith*, 1708, 4 B.S. 716;

Corrie v. Stewart, 1882, 22 Sc.L.R. 350 (fall of floor).

¹⁷² *Hall v. Ross*, 1813, 5 Pat. 729.

¹⁷³ *Gordons v. Suttie*, 1826, 4 Mur. 86; cf. *Bargaddie Coal Co. v. Wark*, 1860, 23 D. 44; and see *Sawers v. M'Connell*, 1874, 1 R. 392, noticed *supra*, p. 194.

¹⁷⁴ *Kilmarnock Gas Light Co. v. Smith*, 1872, 11 M. 58.

'has suffered. . . . The continuance of the tenant in possession may prevent him from rescinding the contract, but will not deprive him of his defence to the landlord's demand.'¹⁷⁵ Again, in a lease of a quarry the landlord bound himself to make a road which was necessary in order to render the produce marketable. The road not having been made at the term of payment of the first half-year's rent, a petition for sequestration was dismissed on the same ground.¹⁷⁶ The principle extends to the enforcement of conditions of the lease, which are so material as to stand on the same level with stipulations relating to the quantum of the subject let. So that, where a shop was let under the condition that an adjoining shop belonging to the same landlord should not be let to any person in the same trade, and a landlord acquiring by purchase from the lessor violated the lease by selling in the latter shop articles which fell under the monopoly, and persistently refused to recognise the tenant's right to control his trade, the tenant was held entitled to withhold the unpaid rent effeiring to the period of his possession to the extent of the damage he had suffered, in defence to an action of mailles and duties, without raising a counter summons.¹⁷⁷ But it is a condition of the doctrine that there be averment and proof of some specific part of the landlord's obligation being unfulfilled.¹⁷⁸

(β) Where the unfulfilled obligation incumbent on the landlord is merely collateral to the principal obligation of giving and maintaining possession, the tendency of the Court has been to refuse permission to the tenant to retain his rent. In some instances it may be thought that this refusal has been contrary to equity. At the close of a lease, it is true, a tenant may retain rent until the amount due to him for meliorations or otherwise is paid or accounted for to him, even where the landlord is a singular successor of the lessor.¹⁷⁹ Of course, where, as sometimes happens,¹⁸⁰ the obligation of the landlord is to pay a fixed sum in recompense for meliorations at the ish, there can be no doubt of the tenant's right to withhold rent *pro tanto*, on the ground not of retention but of compensation. But it is none the less clear

Only collateral obligation.

Cases arising at close of lease.

¹⁷⁵ *Per* L.J.-C. Moncreiff, 11 M. 61.

¹⁷⁶ *Guthrie v. Shearer*, 1873, 1 R. 181; but probably some delay in construction was contemplated and should have been allowed some weight.

¹⁷⁷ *Davie v. Stark*, 1876, 3 R. 1114. (*Semble*, right also to rescind, see *supra*, p. 204).

¹⁷⁸ *Humphrey v. Mackay*, 1883, 10 R.

647, where the averment of loss of water supply was insufficient.

¹⁷⁹ *Supra*, p. 131; *Arbuthnot v. Colquhoun*, 1772, M. 10424; *Walpole v. Beaumont*, 1780, M. 15249; *Bells v. Lamont*, 14th June 1814, F.C. 645; *Stewart v. M'Ra*, 1834, 13 S. 4.

¹⁸⁰ *Supra*, p. 229.

in certain cases that retention is competent. Thus, where right of retention was maintained after the ish of a lease for claims of compensation, arising from a stipulation in the lease that there should be a right of deduction from the rent for the value of dung left on the farm, and arising from a promise that the tenant should be repaid for erecting a smithy, decree for payment of the full rent was suspended pending the ascertainment of these claims.¹⁸¹ A later case seems to run counter to sound principle unless it be explicable on the *ratio* that the outgoing tenant accepted the incoming tenant as his debtor and freed the landlord, whose obligation was to pay for fallow and dung at ish. The decision against the right to retain was laid on the doctrine of liquid and illiquid, and would probably not be repeated.¹⁸²

Cases arising
during the
lease.

In cases which arise earlier in the course of a lease, the Court has been in the habit of passing a bill of suspension of a charge for rents (if a question for trial is set out) only on caution or consignment of the whole rent due,¹⁸³ or of refusing the bill altogether, though caution or full consignment be offered, and setting the tenant to prove his illiquid claim in a separate proceeding.¹⁸⁴ In reading the cases which have arisen during the currency of the lease, it is difficult not to arrive at the conclusion that the rule of liquid and illiquid in compensation, the immateriality to tenant of the collateral obligation incumbent on the landlord, and the ample character of the security for performance, which the tenant possesses in the duration of his tenure, have been allowed an undue weight in favour of the landlord. It appears, however, that the tendency of more recent cases¹⁸⁵ has been to put the parties to a lease on a more equal footing. Thus, where there was sufficient *prima facie* evidence of short entry at the commencement of a lease, of defective water supply, and of deprivation of a particular steading and of pasturage in a wood, the plea against retention, which was given effect to,¹⁸⁶ that there was plenty of security in the future rents for the payment of damages

¹⁸¹ *Heriot v. Halket*, 1825, 3 S. 479 (N.E. 333).

¹⁸² *Dickson v. Porteous*, 1852, 15 D. 1; *Hunter* (ii. 268) doubts the decision and it reversed the judgment of Lord Cowan.

¹⁸³ *Clark v. Finlay*, 1823, 2 S. 480 (N.E. 426); *Gray v. Sword*, 1824, 3 S. 82 (N.E. 55); *Stewart v. Cameron*, 1827, 5 S. 557 (N.E. 524); *Gray v. Renton*, 1840, 3 D. 203; *Carruthers v. Thomson*, 1836, 14 S. 691; see case of partial consignment—*Cumming v. Williamson*,

1842, 4 D. 1304.

¹⁸⁴ *Thomson v. Coventry*, 1833, 11 S. 725 (implied duty); *M'Rae v. M'Pherson*, 1843, 6 D. 302.

¹⁸⁵ *E.g.*, *Kilmarnock Gas Light Co. v. Smith*; *Guthrie v. Shearer*; *Davie v. Stark*; *Humphrey v. Mackay*, *supra*, pp. 292-3.

¹⁸⁶ *Bowie v. Duncan*, 1807, Hume 839. This case seems overruled by the cases, *supra*, and not to be borne out by Hume's own general argument.

when ascertained, hardly afforded a sufficient remedy for present direct loss. The immateriality of the damage is sufficient to account for the refusal of permission to retain rent for reimbursement of a petty loss to the tenant of an inn through the diversion of a road;¹⁸⁷ to a quarrier through non-implementation of an agreement providing for an alteration in the access from his quarry to the high road;¹⁸⁸ to a farmer through the insufficiency of his stead-ing,¹⁸⁹ or of the fences,¹⁹⁰ or of both.¹⁹¹ A case in which power to retain was refused to a tacksman of tolls can only be justified on the *ratio* either that there was no substantial loss from the impassable state of a part of the road in question, or that the claim was shut out by special agreement.¹⁹² In a case relating to burgh customs, there seems to have been no warrantance of certain dues which were eventually found to be inexigible.¹⁹³

There is no right to retain, where the claim to do so is made by a subtenant on the ground that an action of reduction of the principal lease has been raised, so long at least as no legal proceedings are taken against him;¹⁹⁴ nor where it is made by a mining tenant on the ground that the minerals have become unworkable to profit, if he has not taken steps to abandon his lease in pursuance of a clause enabling him to do so in that event after certain proceedings before arbiters.¹⁹⁵ In the latest case where the doctrine of liquid and illiquid was explicitly founded on there was a very special stipulation, and the judgment may be supported on grounds apart from those adduced. The subject let was a brewery. In the lease the tenants accepted the premises as in good repair, and bound themselves to undertake ordinary repairs, while the landlord undertook, in case any portion of the subjects became ruinous or untenable through natural decay, lapse of time, or any other cause, to rebuild or else allow a reasonable abatement of rent. The tenants in defence to an action of mails and duties alleged that part of the subjects had become ruinous and untenable, and supported their averment by an *ex parte* report from men of skill. The landlord replied that the subjects were tenantable and in the same condition as at entry. Right to retain was

Premature
termination.

Drybrough v.
Drybrough.

¹⁸⁷ *Brown v. Gardiner*, 1823, 2 S. 319 (N.E. 259). There was also recourse against the Road Trustees.

¹⁸⁸ *Johnston v. Inglis*, 1832, 10 S. 260.

¹⁸⁹ *Dun v. Craig*, 1824, 3 S. 274 (N.E. 193).

¹⁹⁰ *Thomson v. Coventry*, 1833, 11 S. 725; *Dods v. Fortune*, 1854, 16 D. 478

(see obs. there as to the old and the modern remedies).

¹⁹¹ *M'Rae v. Macpherson*, 1843, 6 D. 302.

¹⁹² *Hill v. Gordon*, 1834, 13 S. 88.

¹⁹³ *M'Rae v. Smith*, 1841, 3 D. 994.

¹⁹⁴ *Sprot v. Morrison*, 1853, 15 D. 376.

¹⁹⁵ *Thomson v. Gordon*, 1869, 7 M. 687.

refused by the Court. It was observed that apart from this clause there would have been no such right; that the option given by it to the landlord led to the same conclusion; and that the existence of the claim must first be ascertained as well as its amount before a claim of retention could arise, at least where the lease had years to run.¹⁹⁶ The action was brought only three years after the entry, which was taken in full knowledge of the decayed state of the buildings, so that there was a *prima facie* presumption against the tenant's case which was not overcome by the report of the experts.

(6) *Abatement or Reduction of Rent agreed on.*

There has already been occasion to notice the deduction from rent which follows on resumption of possession by the landlord in exercise of a reserved right¹⁹⁷ and from loss of part of the subject let *damno fatali*.¹⁹⁸ It remains to consider such abatements of the stipulated rent as are brought about by express agreement. The powers of limited owners and of administrators especially of guardians, judicial factors, and heirs of entail in respect to abatements, and the extent to which they may rely on obtaining the help of the Court have been explained in treating of the parties to a lease.¹⁹⁹ Trustees exercise the same discretion as fee-simple proprietors in their own right.²⁰⁰

Proof.

In regard to the mode of instructing such an agreement or obligation it has been decided that where (as in all cases that are easily conceivable) the lease has been reduced to writing, the abatement must be proved by the writ or oath or judicial admission of the landlord,²⁰¹ whether it extends to one year or to more years than one.²⁰² The main difficulty in construing such obligations lies in determining whether they are merely temporary easements or amount to a reduction of rent for the whole future of the lease. The presumption is, of course, in favour of the smallest possible innovation on a solemn contract of such importance as a lease; and this presumption will not be overcome by merely producing a series of receipts pointing to the acceptance of a reduced rent for a period of years.²⁰³ An admission by the landlord on record is equivalent to, and cannot be retracted by, his oath on reference; and any condition appended to his

¹⁹⁶ *Drybrough v. Drybrough*, 1874, 1 R. 909. (Rent £445; reported annual value of useless portion, £125).

¹⁹⁷ *Supra*, p. 191.

¹⁹⁸ *Supra*, p. 204.

¹⁹⁹ *Supra*, p. 12.

²⁰⁰ *Gill v. E. Fife's Trs.*, 1823, 2 S. 460

(N.E. 412).

²⁰¹ *Riddick v. Wightman*, 1790, Hume 776; *Law v. Gibsons*, 1835, 13 S. 396.

²⁰² *Gibb v. Winning*, 1829, 7 S. 677.

²⁰³ *Riddick v. Wightman*, *supra*, ²⁰¹; *Grant v. Watt*, 1802, Hume 777.

consent to an abatement will be reasonably construed according to the *bona fides* of the transaction.²⁰⁴ A continuing obligation will bind the landlord's singular successors, and, so far as not amenable to the rules against undue preferences, his creditors. Thus, where a landlord empowered his factor in writing to discharge the tenants on his estate by giving them a deduction of 20 per cent., and to acquaint them that this abatement was to outlast their leases, and the writing was acted on for five years, the obligation was held to be incumbent on the trustee on the landlord's sequestrated estate.²⁰⁵

The arrangements made in the Lands Clauses Act for the apportionment of rent where part of subjects let is compulsorily taken, have been already explained.²⁰⁶

²⁰⁴ *Thomas v. Dumbreck*, 1834, 12 S.
285.

²⁰⁵ *Lindsay v. Webster*, 1841, 4 D. 231.

²⁰⁶ *Supra*, p. 202.

CHAPTER XV.

TIME : TERMS : APPORTIONMENT.

IN dealing with the landlord's obligation to give and the tenant's right to obtain possession, it was thought expedient to postpone consideration of the time of entry,¹ and to gather together in one place all that it seems necessary to explain regarding the element of time in leases. This plan involves some anticipation of the law of removings,² but it is justified by the fact that the most important questions, into which time enters as a factor, relate to the right to receive and the obligation to pay rent. There is, moreover, a distinct practical advantage in setting forth in one view the somewhat complicated doctrine of terms and term-days.

Duration of
leases.

Except in so far as a proprietor is restrained by the limited nature of his title, he may grant leases for any length of time he chooses. The ordinary duration of agricultural leases has for a long period been nineteen or twenty-one years; purely pastoral farms have been in use to be let for fifteen years or for a shorter term; mines for twice nineteen years; land for building purposes is frequently let out for ninety-nine years.³ It cannot be said that there is any customary duration in leases of dwelling-houses, factories, mills, fishings, or shootings; or that the ordinary durations just mentioned are founded on any consistent or intelligible theory of cycles, lifetimes, prescription, or perfect numbers.

Duration
clause.

The ordinary form of the duration clause in a lease of agricultural land appends to the description of the lands the words: 'And that for the space of years from and after the term of Whitsunday 18 , as to the houses and grass, and the separation of the corn crop from the ground [or Martinmas] in that year as to the land in crop.'⁴ And by the rent clause, the tenant 'binds and obliges himself, and his heirs, executors,

Rent clause.

¹ *Supra*, p. 184.

² *Infra*, chap. xix.

³ *Supra*, pp. 102, 126.

⁴ 1 Jur. Styles (5th ed.), 569, 574, 590
598.

' and successors whomsoever, to make payment to [the lessor]
 ' and his heirs, executors, or assignees, of the sum of £
 ' yearly in name of rent, and that at two terms in the year
 ' and by equal portions beginning the first term's
 ' payment thereof at the term of , and the next pay-
 ' ment at the term of thereafter, in full of the first
 ' year's rent, being for crop and year , and so forth half-
 ' yearly and termly thereafter during the currency of this lease,
 ' with a fifth part more of each term's payment of liquidate
 ' penalty in case of failure, and the interest of the said termly
 ' payments at the rate of five per centum per annum from the
 ' time the same shall respectively become due during the not-
 ' payment thereof.' ⁵ These two clauses, with the exception of
 that part of the latter which stipulates for penalty and interest,
 are subject to endless variation, according to the nature of the
 subject let and the wishes of the parties; but the above may be
 accepted as the model clauses, and all others as modifications,
 agricultural land having been the subject of the earliest leases in
 Scotland.⁶ It is proposed to consider—*first*, the time of entry
 (involving the time of removing); *second*, the time of payment
 of rent; and *third*, the apportionment of rent.

I. TIME OF ENTRY.

The date of entry should always be expressed.⁷ If not, the Actual:
 right will be presumed⁸ to run from the date of the lease⁹ presumed.
 or from the following term of Whitsunday or Martinmas,¹⁰ unless,
 it is submitted, the contrary be shown as the result of the know-
 ledge of the contracting parties with regard to the termination of
 the previous possession. It frequently happens that, on account Past.
 of entry having been taken, or possession retained, in consequence
 of a verbal agreement, the lease is dated later than the term of
 entry. It is then usual in the lease to declare that the entry
 was so taken ' notwithstanding the date hereof.' ¹¹ The lease
 will then be construed as if it had been executed at the actual
 date of entry, in so far as any other construction would leave any
 clause in it insensible.¹²

⁵ 1 Jur. Styles (5th ed.), 569, 575, 584.

⁶ Dallas, 821; Spottisw. 364; 2 Ross' Lect. 487; 1 Hunter, 53.

⁷ 2 Ross' Lect. 478.

⁸ Mack. 2.6.5, *contra*.

⁹ Seton v. White, 1679, M. 15173; St. 2.9.30.

¹⁰ Oliphant v. Peebles, 1629, M. 11535 (long lease of teinds); St. *supra*, ⁹; Bankt. 2.9.5; Ersk. 2.6.24.

¹¹ 1 Jur. Styles, 590; 2 Ross' Lect. 487.

¹² Foulis v. M'Whirter, 1841, 3 D. 343.

Arable farms—
Whitsunday
and separator
(or Martinmas)
entry.

To arable farms, the usual entry is that which is set out in the above style—Whitsunday as to the houses, fallow lands, and grass, and the separation of the white crop thereafter or Martinmas immediately following the said Whitsunday as to the land in crop. In that case the time of entry is in the eye of the law at Whitsunday. The lease describes the common law or custom of Scotland whereby ‘if a lease be granted to a new tenant of ‘a farm, consisting partly of arable land and partly of meadow ‘or pasture lands for a term of years to commence from Whitsunday, such tenant is entitled to enter on the grass or meadow ‘land immediately on the commencement of the tack; but the ‘outgoing tenant is entitled to continue in possession of such ‘arable lands as are sown until the separation of the crop from ‘the ground,’ having ‘a limited right of entry and occupation ‘for that purpose,’ there being ‘only one lease, not two leases’ or more.¹³ Therefore, where the entry was of this sort and the landlord was under obligation to renew the lease from nineteen years to nineteen years for ever, on the tenant making a certain tender and demand ‘at least twelve months before ‘the expiry of the above term of nineteen years,’ and so on from time to time, a tender and demand made on behalf of the tenant on 1st August in the year preceding the year of expiry of a renewed lease was too late.¹⁴ But this right by common law or custom to continue possession till separation does not extend to a proprietor who is himself in the natural possession of a farm at the time when he lets it ‘with entry at Whitsunday.’ If there be nothing to the contrary he must surrender the whole subject at that term.¹⁵ Sometimes the entry to the whole farm is at Martinmas.¹⁶ In either case, it is usual to make express provision in the lease for working the fallow or paying for having it done by the outgoing tenant.¹⁷ It is impossible to make the entry complete at any given term. There is always something to be done by a tenant before he enters to or after he gives up residence. This gradual entry is sometimes regulated by dates—thus, to fallow-break at 1st March; to houses and grass at Whitsunday; to arable at separa-

¹³ *Per* L. Chan. Westbury in *E. Hope-toun v. Wight*, 1864, 2 M. (H.L.) 35, 37, altg. 1 M. 1097.

¹⁴ *Ibid.*: contrast the twin case of timeous tender declined, *E. Hopetoun v. Hunter's Trs.*, 1863, 1 M. 1074, rev. 3 M.H.L. 50, 4 Macq. 972. The landlord was not entitled to take advantage of his own default.

¹⁵ *Duff v. Wilson*, 1864, 3 M. 173.

¹⁶ 1 Jur. Styles, 582. See a form for a Martinmas and Whitsunday Entry, Appx. No. xiv.

¹⁷ See as to these arrangements, *infra*, chap. xvii. As to the comparative advantages of different entries, Stephens, *Book of the Farm*, § 3257.

tion of crop; and to barns, granaries, and certain cot-houses at Whitsunday following.¹⁸

To pastoral farms the usual term of entry is Whitsunday; to houses of the better class, not let for shorter periods than a year or half-a-year, Whitsunday or Martinmas,¹⁹ more frequently the former; to mines,²⁰ mills,²¹ and other subjects, the usefulness of which does not depend on the seasons, the same terms of Whitsunday and Martinmas. Fisheries, on the other hand, are usually entered to at some date shortly before the end of the annual close-time, so as to give the lessee an opportunity of making the necessary preparations.²² The entry to gardens depends on the nature of the holding. If it be merely an accessory to a dwelling-house, the same entry and ish apply to both. If, however, it is to be regarded as a fruit-producing subject independent of, though, it may be, let along with a house, the date of entry need not be the same; the aim being to enable the person who raises a crop to reap it and then leave the land open to the new-comer—the usual date of entry being Candlemas (2nd February) though the house may not pass till Whitsunday following.²³ In regard to subjects used as grass parks a distinction must be drawn. If they be let at Whitsunday for a year as such, the tenant has had all the occupation contemplated in his lease before Candlemas, after which term the landlord is entitled to enter for the purpose of preparing for the next year's crop of grass (by top-dressing or otherwise) and to turn off the tenant's bestial which if allowed to graze the spring grass would annihilate that crop.²⁴ But if there be a lease of land for years from Whitsunday, the tenant is entitled to exclusive possession down to the last Whitsunday of his lease, and to prevent the landlord from interfering with the land till then—as by preparing it by tillage for the next crop—though as matter of fact the whole subject has all along been occupied as grass parks, and though the rent of each season be payable at Martinmas.²⁵

Pastoral farms,
&c.

Grass parks.

¹⁸ See 1 Jur. Styles, 597. Other ancient terms of partial entry and removing are Candlemas (2nd February), Hay r. Kerse, 1740, M. 13837; Robertson v. Spalding, 1754, Elch. Removing, 8; M'Naughton v. Wilson, 1765, M. 13857; and Beltane (1st May), Grainger v. Hamilton, 1756, Elch. Removing, 3, 5 B.S. 207; Kames' Eluc. 287; Annexed Estates Comrs. v. M'Nab, 1770, 5 B.S. 568, Hailes 335.

¹⁹ Ibid. 684, 685.

²⁰ Ibid. 606, 623, 639, 653, 661, 678.

²¹ Ibid. 688, 692.

²² Formerly Andermas (30th November), Gordon v. Burnett, 1783, M. 13859; now regulated by 25 & 26 Vict. c. 97, sects. 6, 7, and Bye-laws, issued in 1864 and from time to time.

²³ Renton v. Younger, 1823, 2 S. 244 (N.E. 214).

²⁴ Hamilton v. Cunninghame, 1830, 8 S. 955.

²⁵ Addie v. Young, 1862, 24 D. 799.

Term days. From the foregoing statement, the importance of Whitsunday and Martinmas—known as the legal terms—is at once apparent. The term day is the last day of the preceding period; so that the whole day must elapse before a new term commences.²⁶ Of old Whitsunday was a moveable feast 'oft times reaching far into 'summer' so that 'these who remove do eat up and destroy the 'meadows and hained ground;' for remeid whereof the summer and winter terms were by statute declared to be the 15th of May and Martinmas, and the legal term of removing both in burgh and to landward to be the said 15th of May.²⁷ If the lease has been entered into after 14th September 1752, this enactment refers to 15th May and 11th November (which has always been Martinmas day) of the new style.²⁸

Old style. Yet both in rural and in urban tenements it is not unusual to find that the change of eleven days then made, in passing from the Old Style to the New, has been by custom of district or by express provision ignored in practice.²⁹ This postponement of removal, taken along with the circumstance that the date of payment of rent is not postponed, has some advantages in enabling the landlord to avail himself of his right of hypothec without haste or undue harshness. And in late high pasture land, the lambs are more fit for removal near the end than at the middle of May. With rural tenements the legislature has not interfered. But uniformity of entry and removal is now prescribed by statute³⁰ in regard to houses, that is, dwelling-houses, shops, and other buildings, and their appurtenances including dwelling-houses or buildings let along with land for agricultural purposes. The provisions of the Act will be dealt with in a later chapter which treats of removings.³¹

Entry to buildings.

II. TERMS OF PAYMENT OF RENT.

Farm rents. Passing now to the clause of rent,—of which a specimen has been cited above—it will be at once remarked that the rent of *land* is payable for the possession from year to year, though for the sake of convenience it is usual to divide a year's rent into two equal portions. This rule of law is still more accurately described by saying that the rent is due for the *crop* and posses-

Crop.

²⁶ Ly. Brunton, 1642, M. 15885; Paterson v. Smith, 1704, M. 15902; Ly. Tolquhon's Exrs. v. Creditors, 1740, M. 15907; Wright v. Cunningham, 1802, M. 15919.

²⁷ 1690, c. 39, extended to all effects whatsoever by 1693, c. 24; see M'Intyre v. M'Nab's Trs, *infra*, ²⁸.

²⁸ 24 Geo. II. c. 23, sects. 1, 6. Tait, J.P. 518; M'Intyre v. M'Nab's Trs., 1829, 8 S. 237, aff. 5 W. and S. 299.

²⁹ 2 Hunter, 593.

³⁰ 49 & 50 Vict. c. 50 (Removal Terms Act, 1886) repealing an Act of 1881 of less scope—44 & 45 Vict. c. 39,

³¹ Chap xxi.

sion of each year separately, where the possession is had solely or principally for the purpose of periodically rearing and disposing of produce animate or inanimate; and that where, as in the case of dwelling-houses, mills, factories, and the like, the rule does not apply in its entirety, it is followed as closely as possible. In the case of farms the year is regarded as at end with the final reaping of the crop, by cutting or depasturing; and the term of Martinmas is generally accepted as the end of one crop-year and the beginning of another. Rent being payable for this crop and year in two parts, the *legal terms* of payment are at Whitsunday after the crop is sown and at Martinmas after the crop is reaped. Taking an example, *first*, from an arable farm, the legal terms of payment of the first year's rent of a farm to which entry is taken at Whitsunday and at separation 1885 or Martinmas 1885 are at Whitsunday 1886 and Martinmas 1886, the first crop being that of 1886. But *secondly*, if the farm be pastoral and the entry be also at Whitsunday 1885, the first payment is legally due at Whitsunday 1885—the date of entry—and the second at Martinmas 1885, being together the rent for the crop and year 1885, the crop of that year—grass—being the first crop reaped; and there would have been no difference in the legal terms of payment though entry had been taken at Martinmas 1884. The fact that entry is taken at Whitsunday, old style (26th May), does not affect the date when rent becomes payable. So that the first half-year's rent may be legally due eleven days before actual entry.³² Houses follow in some respects the rule of pastoral farms; but not to the extent of entitling a landlord to demand payment for a half-year at the date of a Whitsunday entry. These rules will be illustrated in the following paragraphs.

It is plain from the foregoing statement that it may be of much consequence to ascertain whether a farm is to be regarded as arable or as pastoral. It must be either the one or the other; the produce cannot be divided according as it emanates from the arable or the pastoral portions; the rent is a lump rent for the whole farm; and the decisive criterion is the source from which the profits—or income—are chiefly derived.³³ There is no authority to show what would be the result of such improvements as during the currency of a lease turn a pastoral into an arable farm, or the converse case of laying down a large part of a farm in grass.

The legal terms for the payment of rent being such as above

Arable or
pastoral?
Conventional
terms.

³² Campbell v. Campbell, 1849, 11 D. 1426.

³³ Petley v. Mackenzie, 1805, Hume

186; M'Clymonts v. Cathcart, 1848, 10 D. 1489; Campbell v. Anstruther, 1836, 9 Sc. Jur. 163.

Forehand
rents.
Backhand
rents.

described, the parties may agree upon an acceleration or postponement, on what is known as fore or forehand rent on the one hand, or back or backhand rent on the other. Thus, continuing the illustration given above if the first year's rent of the arable farm were taken payable, the first half at Lammas (1st August), Martinmas, or Yule (25th December) 1885, or Candlemas³⁴ (2nd February) 1886, and the next half at six months after these dates, the rent would be forehand. In pastoral farms forehand rent is scarcely conceivable.³⁵ If, on the contrary, the first year's rent of the said arable farm were taken payable, the first half at Lammas or Martinmas 1886 or any later date, and the second half at six months thereafter, the rent would be backhand, enabling the tenant to earn the rent on the farm before paying it. These forehand and backhand terms are called the conventional, as distinguished from the legal, terms for payment of rent.³⁶

These distinctions are mainly of importance in apportioning the liability for and right to rent among the successors (universal or singular) of the tenant and of the landlord. The rule in both cases is that the legal terms govern the apportionment, to the exclusion of the conventional terms, except where the rent is forehand.

III. APPORTIONMENT.

A. Of Liability for Rent, as between Tenants' Successors.

The subject is somewhat obscure, but the rule seems to be *ubi commodum ibi incommodum*; the rent is divided according to the legal terms, and in proportion as the crop of the broken year is reaped by heir or by executor,³⁷ by original tenant or by assignee.³⁸ The division of the crop is regulated thus:—Crops sown by the lessee, but not reaped by him at the time of his death are, if annual, moveable and go to the executor, while those which are not annual go to the heir.³⁹ It was at one time thought to be settled that with these hay of the second crop went to the heir though sown out with white crop the season before and therefore

Hay crop.

³⁴ These two—Yule and Candlemas—were in vogue for grain rent. 1 Dallas, 609; 2 Ross' Lect. 494; 1 Jur. Styles, (2nd ed.), 628, 635; (3rd ed.), 679.

³⁵ But see *Arbutnot v. Finnart's Creds.*, 1750, M. 13337.

³⁶ Cr. 2.10.11; Ersk. 2.9.64; Kames' Eluc. 59; 1 Bell, Leases, 220; B. Pr. 1047, 1204, 1230; 2 B.C. 8. There is on custom of paying game rents in the

Highlands for the first year at entry, though it is usual to make express stipulation to that effect—*Fraser v. Patrick*, 1879, 6 R. 581.

³⁷ *Macleod v. Mackenzie*, 1725, M. 15905.

³⁸ *Supra*, p. 154.

³⁹ See as to trees in nursery gardens, *Begbie v. Boyd*, 1837, 16 S. 232.

of little value till the second year.⁴⁰ This particular rule was held to be fixed, though it was hard to see why this crop, as artificial as any other, should alone be exempted from the rule *messis sementem sequitur*.⁴¹ Accordingly *dicta* have fallen from the Bench in cases turning on the interpretation of contracts and occurring between landlord and tenant, indicating that the rule can scarcely now be regarded as binding even in questions of succession.⁴² Proceeding on the rule above stated that the representative entitled to the benefit of a lease is liable for the rent, it was decided that executors who were entitled to the crop of the year in which their ancestor died were liable for the rent of that year, but that the rents of subsequent years could only be demanded from his heir who had been acknowledged as tenant by the landlord.⁴³ The testamentary dispositions of the deceased tenant may, however, throw upon the general estate an obligation which would naturally, along with the corresponding rights, have fallen on the heir; and the same result may follow from the terms in which the lease is taken. Thus, where a house let from Whitsunday for a term of years, with break at each Whitsunday, to trustees for the occupant's behoof, was renounced by them at Whitsunday 1801, the beneficiary having died in the preceding October and the house having been inhabited by his servants during part of the interval, it was held that his heir was not liable for the rent of any part of the year.⁴⁴

Tenant's heir
and executors.

B. Of Right to Rents, as between Lessor's Successors.

In reading the cases, it is well to remember that a long and well-sustained controversy has, after being decided by the House of Lords, been superseded by recent legislation. The decision was that, in the matter of right to rents, the lessor's apparent heir was in precisely the same position as if he were infest, and that therefore his executor was preferable to the next heir for those rents which fell due pending the apparency.⁴⁵ It was later decided that a tenant was safe to pay to an heir-apparent in

Heir uninfest.

⁴⁰ *Sinclair v. Dalrymple*, 1744, M. 5421 (heir and executor of fee-simple owner); *Wight v. Inglis*, 1796, M. 5446 (do.); *Ms. Tweeddale v. Somner*, 19th Nov. 1816, F.C. 213 (owner and liferent tenant's executor); *contra*, *Gordon v. Gordon*, 1806, Hume 188 (heir and executor of owner).

⁴¹ See obs. in last case.

⁴² *Keith v. Logie's Heirs*, 1825, 4 S. 267 (N.E. 272), explained in *Lyll v. Cooper*, 1832, 11 S. 96,

⁴³ *D. Gordon v. Leslie*, 1791, M. 5444.

⁴⁴ *Kinloch's Exrs. v. Heir*, 1811, Hume 178.

⁴⁵ *Hamilton's Exr. v. Hamilton*, 1760, M. 5253, rev. 2 Pat. 137. The earlier authorities are to be found in *Balf.* 226; *Cr.* 2.9.29; *St.* 2.1.22, 2.3.16, 2.6.17, 3.5.2; *Bankt.* 3.5.8; *Ersk.* 3.8.58; *Kames' Hist. Law Tr.* 198; *B. Pr.* 1682; 1 B.C. 99; *More's Notes* 319, and cases in *M.* 5243 *seqq.*, 2769, 6246; 2 B.S. 49; 5 B.S. 831.

possession, though there was a subsisting competition for the ownership.⁴⁶ The legislation referred to is the Conveyancing Act of 1874,⁴⁷ which, in its 9th section, does away with the law of apparenacy by vesting through mere survivance a personal right to estates in land, descendible to heirs, of the same nature as a personal right under an unfeudalised conveyance.⁴⁸ So that in regard to the subject of this chapter it is unnecessary to consider whether an heir is infeft or not.

According to
legal terms.

The rule of apportionment—apart from statute—is that the legal terms govern the division of rents between the different classes of successors of a deceasing landlord—in other words, that these terms determine what was *in bonis defuncti* at the time of his death. There is an exception where the rents are beforehand, in which case the conventional terms govern. Otherwise stated, anticipating the term of payment may have an effect on the succession, but postponing it can have none.⁴⁹

Except where
forehand.

Cases.

The rule has been applied in questions between the executors of a deceased liferenter and the fiar;⁵⁰ between the executors and the heir of a fiar;⁵¹ between the executors of a fiar and his widow endowed with locality lands or a bond of provision assigning rents, or a conjunct fee;⁵² whether the rent be payable in money or otherwise;⁵³ and whether the conventional dates of payment come twice a-year or oftener, or annually in one lump sum.⁵⁴ But the vesting is always subject to be altered by the expressed will of a landlord who is not restricted in this direction in the disposal of his estate.⁵⁵ Such will is not expressed

⁴⁶ *E. Wemyss v. Campbell*, 1864, 2 M. 461 (the heir was the lessor, but the decision went on the general ground).

⁴⁷ 37 & 38 Vict. c. 94.

⁴⁸ See *M'Adam v. M'Adam*, 1879, 6 R. 1256; *Fleming's Trs. v. Fleming's Tutors*, 1882, 9 R. 1013.

⁴⁹ Cr. 2.9.13; *Hope*, Min. Prac. 3.40; St. 3.8.57; *Ersk.* 2.9.64; *Kames' Eluc.* 59; 2 B.C. 8; B. Pr. 1499; *More's Notes*, 139; *Elliot's Trs. v. Elliot*, 1792, M. 15917.

⁵⁰ *Blaus v. Winraham*, 1631, M. 15881, 1 B.S. 186; *Laurie v. Maxwell*, 1711, M. 15905; *Baillie v. Cuthbert*, 1684, M. 15900 (bond); *Guthrie v. Mackerston*, 1671, M. 15890, 2 B.S. 152 (mill).

⁵¹ *L. West-Nisbet v. L. Swinton*, 1635, M. 15883 (mill); *Johnston v. M. Annandale*, 1727, M. 15913; *Pringle v. Pringle*, 1741, M. 5419, 15907; *Turnbull v. Ker*,

1760, M. 5430 (do.); *Innes v. D. Gordon*, 1822, 2 S. 3 (N.E. 2); *Trotter v. Cunningham*, 1839, 2 D. 140. *Kames' Eluc.* 60, 65) questions the soundness of the rule in this case, but it is fixed.

⁵² *Carnegie v. Carnegie's Exrs.*, 1688, M. 15887; *Aiton v. Hume*, 1629, M. 15879; *Trotter v. Rocheid*, 1681, M. 2375, 15899; *Lockhart v. Lockhart*, 1839, 1 D. 443. In *Cruikshank v. Sandeman*, 1843, 5 D. 643, the widow's right was good against executors as well as heir by the terms of the provision.

⁵³ *Gordon v. Gordon*, 1806, Hume 188.

⁵⁴ *Carnegie v. Carnegie's Exrs.*, *supra*, 52; *Petley v. Mackenzie*, 1805, Hume 186; see *Campbell v. Campbell*, 1745, M. 15908; *Elch. Heir and Exr.* 3; *Gooden v. Chisholm*, 1829, 8 S. 165.

⁵⁵ Cf. *Cruikshank*, and *Trotter*, *supra*, 52.

where there has been an obvious mistake in the rent clause, as where the rent of a grass-farm, entered at Whitsunday, was taken payable one half at Martinmas thereafter 'for the half-year immediately preceding,' and the other half at next Whitsunday 'for the full year's rent'—thus ignoring one half of the first year's crop and possession.⁵⁶ The rule has been applied in relation to subjects of all sorts. Most of the illustrations relate to arable farms, and no question seems to have ever been seriously moved in regard to them.⁵⁷ As to the application of the rule to pastoral farms there has been some controversy ending in the establishment of the principle.⁵⁸ It is pleasant to be able to state the law in the words of the philosophic Monboddoo. 'The simple rule in this case and which will apply equally to corn and grass farms is the crop; without attending to the division of the year which is arbitrary as to its commencement. According to this rule the crop, whether of grass or corn, belongs to that year in which it grows and is reaped; and the rent for that crop is divided betwixt the heir and executor by the legal terms, of the Whitsunday when the crop was sown, and of Martinmas when it is reaped; so that, without inquiring about years at all, it is sufficient to consider whether the rent for that crop be still in the tenant's hands or if it be uplifted by the defunct, as, in the case of forehand rent, the executor has no claim.'⁵⁹ If the ancestor survived⁶⁰ Whitsunday, the half of that year's rent was vested in him and went to his personal representatives; if he survived Martinmas, the whole.

It seems to be settled that the same rule applies to the rents of grass parks let for the season, April to December;⁶¹ and to the rents of grist-mills at least when let with multures;⁶² but the question whether the division of rents of 'windmills and clockmills which have no thirlage' would be regulated by terms was left open.⁶³ The apportionment of rent of houses followed the analogy of farms—the nearest analogues being grass-farms. Therefore the proprietor of a house dying between Whitsunday

⁵⁶ *Turnbull v. Ker*, *supra*, ⁵¹. Therefore, proprietor dying after Martinmas, his executor got the whole rent of the year. As to this case see Elliot's Trs. *infra*, ⁵⁸, and Kames' Eluc. 68.

⁵⁷ Authorities in note ⁴⁹, *supra*; *Blaikie v. Farquharson*, 1849, 11 D. 1456.

⁵⁸ *Johnston v. M. Annandale*: *Pringle v. Pringle*, *supra*, ⁶¹; *Campbell v. Campbell*, *supra*, ⁵⁴; *Elliot's Trs. v. Elliot*, 1792, M. 15917 (general rule stated);

Campbell v. Campbell, 1849, 11 D. 1426.

⁵⁹ In *Kerr v. Turnbull* (s.c. as *Turnbull v. Ker*, *supra*, ⁵¹), at 5 B.S. 876.

⁶⁰ As to which, *infra*, p. 309.

⁶¹ *Swinton v. Gawler*, 20th June 1809, F.C. 330; 2 B.C. 8; More's Notes, 139; Ivory's Notes, 241, to Ersk. 2.9.64.

⁶² *L. West-Nisbet v. L. Swinton*, *supra*, ⁵¹; *Guthrie v. Mackerston*, *supra*, ⁵⁰.

⁶³ *Guthrie*, *supra*, ⁵⁰.

Mines, &c.

and Martinmas has right vested in him to the first half-year's rent of the current year; whether the possession began at the Martinmas or at the Whitsunday before the death, and though the term of payment were conventionally postponed.⁶⁴ In relation to other subjects, such as mines, fisheries, game, and the like, there is little authority in regard to a division of rents according to terms. It may be presumed that at common law no more would be regarded as *in bonis defuncti* than was conventionally payable before that event, unless there were something in the contract between landlord and tenant to show that rent payable thereafter was due for possession during the life of the deceased.⁶⁵ It was never decided, but an opinion was expressed, prior to the Apportionment Acts, that the division must not be governed by the terms, but be regulated by the possession *de die in diem*, where, as in factories and mines, the profits arise from continual daily labour, irrespective of the seasons.⁶⁶ But this view cannot now be accepted where the rent is taken payable according to terms, for a case of mineral rents was decided on the *ratio* that a termly rent must be considered as due at a term (and at no intermediate date), whatever that term may be.⁶⁷ Minerals were let with entry at Martinmas for a fixed rent payable at Whitsunday with an option to the landlord of claiming instead of the fixed rent a lordship, exigible at the following Martinmas on the minerals raised, sold, carried off, or consumed during the preceding year, under deduction of the rent paid at the said Whitsunday. The landlord having died on 31st May, it was held that his executors were entitled to half of the lordship exigible at the following Martinmas, after deduction of the fixed rent; but that they had no right to share in the lordship on minerals, raised to the surface before, but not sold till after, the said Martinmas. The lordship, though payable in lump, was regarded as if payable half at Whitsunday and half at Martinmas, which are the legal

⁶⁴ Binny v. Binny, 22nd Jan. 1820, F.C. 91; King v. Jaffray, 1828, 6 S. 422; L. Daer v. D. Hamilton, 1740, 5 B.S. 695, Elch. Her. and Mor. 11; B. Pr. 1502; 1 Bell, Leases, 492. The reasonableness of the rule is questioned by L. Monboddie in L. Daer, *supra*; L.P. Hope in Binny, *supra*; Kames' Eluc. 67; and L. Deas in Weir's Exrs. v. Durham, 1870, 8 M. 725, 729.

⁶⁵ See op. of L.P. Hope in Binny v. Binny, *supra*, ⁶⁴.

⁶⁶ Ersk. 2.9.66 (liferent and fee). As to pensions, salaries, and payments connected with rents, see E. Kelly v. Beaton, 1666, M. 15887; E. March v. E. Leven, 1710, M. 15904; Linning v. Gustard, 1736, M. 15914; Baillie v. Cuthbert, 1684, M. 15900; Carruthers v. Barclay, 1738, M. 5413; Kynynmond v. Rothead, 1739, M. 5415, Elch. Her. and Mor. 10, 11; L. Daer v. D. Hamilton, *supra*, ⁶⁴.

⁶⁷ *Per* L. Kinloch in Weir's Exrs., *supra*, ⁶⁴, 8 M. 732.

terms for other subjects besides farms. And the rule of vesting *de die in diem* was held to be inapplicable to a case of fluctuating production.⁶⁸

The exception, in the case of forehand rents, to the rule of Forehand. looking to the legal terms in apportionment is thus stated in a celebrated passage by Lord Kilkerran. 'The meaning of the 'common maxim that the legal and not the conventional terms 'are the rule between heir and executor is no other than this, 'that the postponing the legal term by the convention of parties ' (which generally is the case of tenant's rents) does not deprive 'the executor of the benefit of the legal term. But, if by the 'convention of parties, annual-rents, for example, be made payable before the legal term, the executors will have the benefit 'of that convention; and the case would be the same in a fore-hand payment of rents of lands, for there is no instance of what 'is both due and exigible not going to executors.'⁶⁹ This rule has been applied between executor and heir where the first half of the first year's rent of an arable farm was taken payable at Martinmas instead of Whitsunday after entry;⁷⁰ between an heir of entail in possession and the executors of the widow of a former heir, with right to a locality;⁷¹ and between the executor of an heir of entail and the succeeding heir.⁷² But an heir of entail in possession cannot during his tenure alter the practice of the estate by substituting forehand for normal or backhand rents, so as to benefit his executors at the expense of the substitute succeeding to him;⁷³ nor, on the other hand, will the right of the executors be prejudiced by such postponement out of consideration for the tenants as has not been reared into the practice or custom of the estate.⁷⁴

When it is stated that, in order to take the rents due for the period ending on Whitsunday or Martinmas, the proprietor must have survived the term day, the meaning is that he shall have survived any part of that day, not noon,⁷⁵ or the greatest part,⁷⁶

Survivance of term day.

⁶⁸ Weir's Exrs. v. Durham, *supra*, ⁶⁴. The case of Binny, *supra*, ⁶⁴, shows that there was not, as L. Deas supposes, any difference of principle between grass and house rents.

⁶⁹ M. Kynynmound v. Cathcart, 1739, M. 15906 (bond); 2 B.C. 8; Ersk. 2.9.64, Notes.

⁷⁰ M. Queensberry v. D. Queensberry's Exrs., 18th Feb. 1814, F.C. 572.

⁷¹ Gooden v. Chisholm, 1829, 8 S. 165.

⁷² L. Herries v. Maxwell's Curator, 1873, 11 M. 396.

⁷³ Ms. Queensberry : Gooden : Herries, *supra*; Swinton v. Gawler, 20th June 1809, F.C. 330.

⁷⁴ Gooden v. Chisholm, ⁷¹, (the 'accommodation' granted by a widow infert in a locality lasted sixteen years, yet did not deprive her of the full rents [forehand] due for her possession).

⁷⁵ See Cr. 2.9.13; Ersk. 2.9.64.

⁷⁶ Bankt. 2.6.24.

or the whole of the day.⁷⁷ The importance, which at one time attached to the determination of this point, has now been taken away by the passing of the Apportionment Acts, which now fall to be considered.

C. *As affected by the Apportionment Acts.*

Act of 1834.

In the year 1834 the first Apportionment Act⁷⁸ was passed, the second section of which, though couched in terms of the English law, was held to apply to Scotland.⁷⁹ It came into operation only on the death of a person—such as a liferenter or heir of entail—whose death caused a determination of his interest.⁸⁰ This Act is practically superseded⁸¹ by a more general statute, passed in 1870,⁸² and applicable to all cases of periodical payments ;⁸³ so that the numerous cases which arose under the earlier Act are now only of value in so far as they consist with and illustrate the later statute.

Act of 1870.

The mischief set out in the preamble of the Act of 1870 is the fact that at common law rents and some other periodical payments are not apportionable (like interest on money lent), in respect of time. The leading enactment is that, 'from and after the passing of this Act [1st August 1870], all rents,⁸⁴ annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise⁸⁵), shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly' (sect. 2). The apportioned part is to be payable or recoverable when the entire portion of which such apportioned part shall form part shall become due and payable, and not before, or would have been payable, if it had not been determined by re-entry, death, or otherwise (sect. 3).

'All persons and their respective heirs, executors, administrators,

⁷⁷ St. 3.8.57 ; *Merchiston Tenants v. Napier*, 1609, M. 15877 ; *Ly. Brunton*, 1642, M. 15885 ; *Paterson v. Smith*, 1704, M. 15902 ; *Lady Tolquhon's Exrs. v. Creds.*, 1740, M. 15907 (bond). Contrast this rule in favour of executors with the rule, *supra*, p. 302, as to end and beginning of a term.

⁷⁸ 4 & 5 Will. IV. c. 22.

⁷⁹ *Brydges v. Fordyce*, 1844, 6 D. 968, aff. 6 B. Ap. 1.

⁸⁰ *Campbell* : *Blaikie, infra*, ⁹⁰, ⁹¹ ; *Baillie v. Lockhart*, 1855, 2 Macq. 250, 18 D. (H.L.) 22 ; *Pott v. Riddell*, 1859, 21 D. 800 ; *L. Adv. v. Stevenson*, 1866, 4 M. 322 ; *Bannatine's Tra. v. Cunningham*,

1872, 10 M. 319.

⁸¹ Its scope is pointed out by Lord Westbury in *Paul v. Anstruther*, 1864, 2 M. (H.L.) 1, 5.

⁸² 33 & 34 Vict. c. 35 (the Act of 1834 is not expressly repealed).

⁸³ Except premiums of insurance (sect. 6) ; matters provided for by special statute—*Latta v. Edinburgh Eccl. Comrs.*, 1877, 5 R. 266 (stipend and ann) ; and matters expressly barred (sect. 7).

⁸⁴ 'Rent' includes all periodical payments or renderings in lieu of or in the nature of rent.

⁸⁵ So that *E. Dalhousie v. Cokat*, 1868, 6 M. 659 (point 1), is no longer law.

‘ and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances), as they respectively would have had for recovering such entire portions as aforesaid, if entitled thereto respectively; provided that persons liable to pay rents reserved out of, or charged on lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically; but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this Act or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this Act to the same by action at law or suit in equity’⁸⁶ (sect. 4).⁸⁷

The result of the common law was that the survivance by a proprietor—or other person entitled to draw rents—of a part of a term, however large that part might be, vested in him nothing more of termly rents than if he had survived the beginning of the preceding term day by an hour only. The result of the above statute—as of its predecessor in a more restricted sphere—is to vest in him and transmit to his executors the rent due for the period he so survived into the broken term, the part of the term’s rent so due being fixed by the proportion between the number of days he lived into the said term, and the number of days thereof still to run at his death. The rent is taken as accruing *de die in diem*. No alteration is made on the rule that the legal terms and not (except in case of forehand rents) the conventional terms must be looked to in questions of vesting. In no case does the Act seem to take away from the defunct or his personal representatives any benefit which they would have had without it;⁸⁸ on the contrary it gives them a share of rents which they had no right to at common law—the rents effeiring to the broken term, that is, the term which began during the ownership of one person

Operation of
the Act.

⁸⁶ Duff’s Trs. v. Shand’s Trs., 1864, 2 M. 1342.

⁸⁷ The proviso is substantially repeated from the Act of 1834.

⁸⁸ The revenue authorities (Currie, Confirmation of Exrs., p. 107; Directions as to inventory duty, p. 2), seem to detect an exception in the case of rents of houses entered at Whitsunday, conven-

tionally payable at Martinmas and Whitsunday thereafter; but there seems to be nothing in the Acts to oust the rule and to prevent the executors of an owner who dies between Whitsunday and Martinmas from getting the first half of the year’s rent at common law, and an apportioned part of the second half by statute; and the contrary view is opposed to the

and ended during the ownership of another. Therefore, the owner of a grass farm having died on 18th May, his executors were entitled at common law to the rent legally due at the preceding Whitsunday, but payable by conventional postponement on the following Martinmas, and by statute⁸⁹ to a proportion of the next half-year's rent corresponding to the three days by which the deceased had survived Whitsunday.⁹⁰ And, the owner of an arable farm having died on 14th May 1841, his executor had right at common law to the last half of the rent for the crop of the preceding year—legally due at Martinmas 1840, conventionally payable on the day after the death—and by statute to the first half of the rent for crop, 1841, under deduction of the proportion effeiring to the one day which was required to complete the first term of 1841.⁹¹ Where rents were taken payable forehand—at Martinmas and Whitsunday after a Whitsunday entry—and the owner died on 18th July 1872, the executor was entitled at common law to the half-year's rent payable at Whitsunday 1872, and by statute to an apportioned part of the rent payable at Martinmas 1872 corresponding to the interval between Whitsunday 1872 and the date of the death. The words of the Act were sufficient to support this conclusion, and it was not necessary to rely on the declaration in the leases that at each term the rent was payable for the half-year preceding.⁹²

Allowances.

The statute says—as did its predecessor—that proportional parts of all just allowances shall be allowed. Therefore, the executor is bound to allow the heir before apportioning the rents of a broken term to deduct a payment made to the deceased's widow under her jointure which is charged on the estate, in so far as the jointure becomes payable on or before the term-day, at which the apportionable rents become payable;⁹³ but he is not entitled to seek repetition (if paid) or relief (if not paid) of a proportional part or any part of a sum payable as an

judgments in Campbell; and Blaikie, *infra*,⁹⁰,⁹¹; and to the words of the second section of the Act of 1870 which applies only to 'accruing' rents, while *ex hypothesi* the rents due at Whitsunday of entry have then at common law 'accrued,' and have become *in bonis defuncti*. The question is one of great difficulty, and deserves solemn consideration, especially since it was not really open under the earlier Act.

⁸⁹ The Act of 1834.

⁹⁰ Campbell v. Campbell, 1849, 11 D. 1426, 1438, 1442.

⁹¹ Blaikie v. Farquharson, 1849, 11 D. 1456. The opinions in these two cases—which were heard together—are very instructive.

⁹² L. Herries v. Maxwell's Curator, 1873, 11 M. 396.

⁹³ Paul (or Hard) v. Anstruther, 1862, 1 M. 14, aff. 2 M.H.L. 1; Learmonth's Trs. v. Sinclair, 1878, 5 R. 548.

annuity in advance before the date of the death.⁹⁴ If money have been borrowed—for improvements on the estate—repayable capital and interest, by half-yearly instalments, the payment for the half-year in which the owner died must be apportioned, as well as the rents, or, in other words, be deducted from the rents before apportioning them.⁹⁵ The same rule applies to interest on a bond affecting the estate. A landlord died the day after Whitsunday. It was agreed by the parties that questions between them should be decided as if he had died on the term-day itself. And it was held that his executrix was liable for no part of annuities or burdens falling on the estate and effeiring to possession after that Whitsunday, but only for burdens effeiring to possession prior to that date.⁹⁶ It will depend in each case on the amount of the deceased's interest in the estate, whether his executors shall or shall not be liable to a proportion of an ecclesiastical assessment; ⁹⁷ but they will not be liable for any part of an assessment laid on subsequent to their author's death.⁹⁸

The Act appears to be retrospective.⁹⁹

D. *As between Vendor and Purchaser.*

A purchaser's entry is usually declared to be at a particular term; and the rule of apportionment is that he is entitled—in the absence of contrary stipulation—to the rents which effeir to the period subsequent to that term of entry, whether payable at the legal or at conventional terms; ¹⁰⁰ unless these rents, being forehanded, have become already payable before or at the date of entry.¹⁰¹ The words commonly used, giving the purchaser right to the rents 'from and after the term of entry,' ¹⁰² or to the rents payable 'for possession' after that date,¹⁰³ have that meaning. Where the entry of purchasers was to houses, grass,

According to date of entry and legal terms.

⁹⁴ Paul, *supra*, ⁹³.

⁹⁵ Learmonth's Trs. v. Sinclair, ⁹³; 27 & 28 Vict. c. 114, sect. 66. The point did not rise in Maitland v. Maitland, 1877, 4 R. 422.

⁹⁶ Maitland v. Maitland, ⁹⁵. (There was therefore statutory apportionment.)

⁹⁷ Morham Min. v. Binston, 1679, M. 8499; Ly. Anstruther v. Anstruther's Trs., 1823, 2 S. 306 (N.E. 269).

⁹⁸ Maitland v. Maitland, *supra*, ⁹⁵.

⁹⁹ Capron v. Capron, L.R. 17 Eq. 288; *Re Cline's Estate*, L.R. 18 Eq. 213; Hasluck v. Pedley, L.R. 19 Eq. 271; Constable v. Constable, 11 Ch.D. 681; cf. Jones v. Ogle, L.R. 8 Ch. 192.

¹⁰⁰ Sinclair v. Sinclair, *infra*, ¹⁰⁴; see the converse case (between incoming and outgoing tenants) of liability according to possession, despite a clause which *prima facie* had a different meaning; Johnston v. Mackie, 1850, 12 D. 739.

¹⁰¹ Murray v. Drummond, 1670, M. 15880; Arbuthnot v. Finnart's Creds., 1750, M. 13337 (grass); see Hay v. Halket, 1887, Sc.W.N. 16.

¹⁰² Penman v. Ker, 1828, 6 S. 940 (year from Whitsunday to Whitsunday); Stevenson v. Moncrieff, 1845, 7 D. 418.

¹⁰³ Hunter v. Stewart, 1857, 20 D. 60 (grass, backhand); Murray's Trs. v. Jardine, 1865, 3 M. 845 (corn, backhand).

and pasturages at Whitsunday, and to the arable land at Martinmas 1823, and they were 'to have right to the rents, maills, and ' other duties from and after these respective terms,' they had no right to any part of the rent for the year 1823.¹⁰⁴ Much will, therefore, depend on the question whether the land sold be arable or grass land, for the same rent may be backhand, if the farm be pastoral, and forehand, if accounted arable.¹⁰⁵ Or the first payment due to the purchaser may be more explicitly pointed out by giving him right 'to a particular crop and year,' in which case the same question arises.¹⁰⁶ In this latter case, the statement of the crop overrides an erroneous addition purporting to explain when the rent for the said crop is payable.¹⁰⁷ An assignation of rents 'after the first term of Martinmas or Whitsunday next after the death' of the survivor of two spouses did not carry right to the rent due and payable at the Whitsunday following the survivor's death in April.¹⁰⁸ If the legal purport of the contract of sale is plain, the hardship that interest on the price (through mistake as to the arable or pastoral nature of the land or otherwise) begins to run before the rent due to the purchaser becomes current, will not be allowed to influence the construction.¹⁰⁹ The plain words of the contract cannot be controlled by the terms of a preliminary correspondence,¹¹⁰ or by alleged local custom.¹¹¹

Apportionable. It was held in an early case¹¹² that if a contract of sale of land, dated between terms, neither expressly disposes the rent then accruing and legally due at the coming term (or later), nor reserves it, nor fixes the purchaser's entry, the vendor has no right to any part of the said rent, since he has denuded himself of all right at a time when there was no completed title to it vested in him. It would probably now be held that the accruing rent was apportionable under the Act of 1870, which is wide enough to reach the case.¹¹³ But the parties may otherwise provide. Thus a disposition of lands assigned the rents from the

¹⁰⁴ *Sinclair v. Sinclair*, 1847, 10 D. 190 (repetition eight years later allowed with interest from time of challenge).

¹⁰⁵ *Sheppard v. Watherstone*, 1817, 5 Dow 278, plainly, though not expressly, proceeded on the view that the farm (100 ac. arable, 700 ac. pasture) was pastoral.

¹⁰⁶ *Sheppard*, ¹⁰⁵; *Arbuthnot*, ¹⁰¹.

¹⁰⁷ *Dalrymple v. Bruce*, 1860, 22 D. 1177 (forehand; yet described as 'being 'those payable at' a backhand date).

¹⁰⁸ *Cleland v. Crawford*, 1768, 5 B.S.

168 (mortification).

¹⁰⁹ *Campbell's Trs. v. Campbell*, 1800, M. Term, Leg. and Conv., Appx. 1 (grass).

¹¹⁰ *Stevenson v. Moncrieff*, *supra*, ¹⁰²; see *Maxwell's Trs. v. Scott*, *infra*, ¹¹³.

¹¹¹ *Murray's Trs. v. Jardine*, *supra*, ¹⁰³.

¹¹² *Caldwell v. Stirk*, M. 15880, 1 B.S. 173, 291.

¹¹³ 33 & 34 Vict. c. 35, *supra*, p. 310; *per* L. Gifford in *Maxwell's Trs. v. Scott*, 1873, 1 R. 122, 126.

date of delivery thereof, being the 14th day of October 1871, and without regard to the legal question of crops. The lands were arable; the entry of tenants was at Whitsunday and separation, and the sett was forehanded, the rents payable at Martinmas 1871 being the first half-year's rents for crop 1872, legally due six months later. It was contended by the vendor that these rents were apportionable between him and the purchaser in the proportion of 152 to 28—the number of days in the term on either side of the date of the sale. But it was held that the purchaser was entitled to the whole of these rents, as effeiring to possession subsequent to the date of his right, and that the exclusion of legal questions as to crops was only intended to bar apportionment (at the above ratio) of the rent, payable at Whitsunday and uplifted at Lammas 1871, for the broken term.¹¹⁴

¹¹⁴ Maxwell's Trs. v. Scott, *supra*, ¹¹³, revg. L. Gifford, diss. L. Benholme.

CHAPTER XVI.

REMEDIES FOR RECOVERY OF RENT.

Remedies
specially ap-
propriate.

ALL the ordinary remedies available for recovery of debt are open to the landlord for the recovery of rent. He may raise an ordinary petitory action for debt, adjudge, inhibit, arrest, or poind, or he may in certain circumstances call in aid the process of sequestration in bankruptcy or *cessio bonorum*. But the remedies which are specially appropriate can alone be dealt with here. These are summary diligence following on a decree of registration; action of maills and duties; sequestration founded on hypothec; and recourse against a cautioner. These will be noticed in the order stated.

I. SUMMARY DILIGENCE.

Registration
for execution.

Formal leases invariably contain, immediately before the testing clause, a registration clause in this short form: 'And they [the parties] consent to registration hereof for preservation and 'execution.' The consent to registration for execution alone concerns us here. It is declared by statute¹ (when thus expressed and unless specially qualified) to 'import a consent to 'registration and a procuratory of registration in the Books of 'Council and Session or other judges' books competent, therein 'to remain . . . if for execution, that letters of horning, and 'all necessary execution shall pass thereon, upon six days' charge 'on a decree to be interponed thereto in common form.'² The same short form when used in long leases under the Registration of Leases Act of 1857 is authentically interpreted in equivalent terms.³ It will be enough to refer to other treatises for the

¹ 31 & 32 Vict. c. 101, sect. 138.

² Following in the main the words of the *ad longum* clause in former use.

³ 20 & 21 Vict. c. 26, by incorporating the repealed provision of 10 & 11 Vict. c. 50, sect. 2, and sched. A. If the clause

appears in such a lease registration in the Register of Sasines is held as registration for execution (31 & 32 Vict. c. 64, sect. 12); though the deed be already registered there for preservation only (40 & 41 Vict. c. 40, sect. 6).

history and rationale of this form of predetermined judgment or decree by consent.⁴ A simple form is now prescribed for the extracts given out by the proper officer from the Books of Council and Session and the Sheriff Court Books,⁵ beginning with a statement of the presentation of the writ for registration on a certain date ; inserting a full copy ; and closing with the words, ' And the said Lords grant [*or the sheriff grants, as the case may be*] warrant for all lawful execution hereon.' This is a warrant ' to arrest the readiest goods, debts, and sums of money of the debtor or obligant mentioned in such extract, in payment and satisfaction of the sum or sums of money, or obligation or obligations therein specified, as also to charge the debtor or obligant therein mentioned to pay the sum or sums of money, or to perform the obligation or obligations therein specified within the appropriate days of charge under the pain of poinding and imprisonment so far as competent, the terms of payment or implement being first come and bygone, and, if he fail to obey the said charge, then so far as competent to apprise, poind, and distrain all his readiest goods, gear, and other effects in payment and satisfaction of the said sum or sums or obligation or obligations, and if necessary for effecting said poinding to open shut and lockfast places.'⁶ The short warrant is thus made equivalent to the longer form appended to the Personal Diligence Act of 1838,⁷ which itself did much to simplify diligence.

The appropriate days of charge here referred to are in cases of edictal charges fourteen days, in other cases six days.⁸ It is very doubtful whether the Court would sanction a consent to restrict the days to less than six.⁹ Imprisonment for debt having been abolished except (so far as applicable to the present subject) under decrees *ad factum præstandum*,¹⁰ the words 'and imprisonment' in the foregoing quotation are omitted, unless the decree comes under the excepted category.¹¹ As *ex hypothesi* the landlord holds or can at once obtain a decree (of consent) against the tenant, *fugæ* warrants can now (if imprisonment

Rules of enforcement.

⁴ The best account of it is given in 1 Bell, Conv. 219. See also Ersk. 2.5.54; 4.1.63; B. Pr. 86; 1 B.C. 4; 1 Ross' Lect. 92; Menz. Conv. 160; 1 Jur. Styles (5th ed.), 60; Begg, Conv. Code, 264, 456, 529.

⁵ 40 & 41 Vict. c. 40, sects. 1, 2, and sched. The authentication is provided for by sect. 5.

⁶ *Ibid.*, sect. 3.

⁷ 1 & 2 Vict. c. 114, sched. 1, (A.S.,

24th Dec. 1838, sects. 1, 2). Faulty warrants issued under this Act prior to 10th August 1877 are cured by 40 & 41 Vict. c. 40, sect. 4.

⁸ 31 & 32 Vict. c. 100, sect. 14; 1 Bell, Conv. 504; Campbell on Citation, 191.

⁹ *Forrester v. Walker*, 27th June 1815, F.C. 467, 474.

¹⁰ 43 & 44 Vict. c. 34; see also 44 & 45 Vict. c. 42.

¹¹ A.S., 8th Jan. 1881.

is otherwise incompetent) be of little use where there is a formal registered lease,¹² and the oppression sometimes wrought by the old law is thus out of date.¹³ The old form of proceeding by letters of horning¹⁴ is still competent, but is on account of the expense (which cannot be recovered) superseded by the modern forms above described, except in a few cases which are not concerned with the recovery of rent.¹⁵ It will be observed that the warrant extends to future rents and prestations, 'the terms of payment being first come and bygone;' but this does not absolve the landlord from the necessity of giving a new charge for each successive term's rent after it becomes payable, the charge not being, like the warrant, prospective.¹⁶ The arrestments and poinding proceed in the usual way.

Arrears under deduction.

Articles of roup.

Suspensions.

Vague charge
*ad factum
prestandum.*

Few cases have been reported, illustrating the law of summary diligence on leases. A charge for arrears of rent under deduction of what may be recovered under right of hypothec is not void for uncertainty.¹⁷ If the contract stands on articles of roup, containing an obligation to pay a fixed rent and a clause of registration for execution, summary diligence may proceed; but if the articles, though containing such a clause, provide only for a formal tack being entered into with caution for payment of the rent contained in the successful bode, all that the registration clause imports is a summary compulsitor to execute the formal tack.¹⁸ The cases in which a bill of suspension of a charge will be passed, on caution¹⁹ or consignment, where counter claims are set up by the tenant have been already noticed.²⁰ A charge following on an extract registered lease with warrant under the Personal Diligence Act ordered the tenant to cultivate and manage the lands let according to the most approved rules of good husbandry, and to implement and perform the whole obligations having reference to the proper cultivation and management of the farm within six days, under pain of poinding and imprisonment. The tenant, having been imprisoned, presented a note of suspen-

¹² *Ibid.*, Kidd v. Hyde, 1882, 9 R. 803.

¹³ M'Gill v. Ferrier, 1837, 15 S. 882, 16 S. 934; as to which case Mr. Bell's remarks (Pr. 1232) seem just; Dick v. Stewart, 5th Jan. 1836, F.C., 14 S. 205.

¹⁴ St. 2.3.22, 2.4.60, 4.47.7; Ersk. 2.5.55, 4.3.9; 2 B.C. 7, 159, 435; B. Pr. 2311; 1 Ross' Lect. 237; Campbell, Citation, 179; 2 Dallas, 57; Alexander, Bankruptcy, 445.

¹⁵ 1 Mackay, Practice, 65, and Law

Courts Commission, p. 620, there cited.

¹⁶ 2 Bell, Leases, 4.

¹⁷ In Martin v. Forbes, 1824, 3 S. 275 (N.E. 194).

¹⁸ Brown v. Birtwhistle, 1823, 2 S. 469 (N.E. 419).

¹⁹ See case of juratory caution allowed on account of landlord's *mora*, Hamilton v. Tennent & Co., 11th July 1839, F.C. 1261.

²⁰ *Supra*, p. 294.

sion and liberation; and the Court suspended the charge simpliciter. The grounds of judgment were that it did not point out what obligations the landlord meant to enforce and the tenant had failed to implement; that pointing and imprisonment of the tenant would not help on but rather retard the exercise of good husbandry; and that in any case more than six days would be required for implement.²¹ It was admitted that such a general charge, *ad facta præstanda*, was unprecedented; it was obviously oppressive. But the question was left open whether an obligation to perform a specific act prescribed in the lease could be enforced by summary diligence. It was pointed out that the more regular course even then would be to bring an action *ad factum præstandum*, and charge on the decree so obtained. While the tendency of Lord President Inglis' opinion seems to be towards the competency of the summary remedy,²² Lord Shand was distinctly of a different mind; but the illustrations he gave were taken from courses of conduct rather than specific acts;²³ and the competency would probably be held to depend on the distinction between the two and the possibility of performance within the days of charge.

II. ACTION OF MAILLS AND DUTIES.

The expression 'maills and duties' is an old-fashioned pleonasm for 'rents,' and the action is the ordinary action for payment of rents, generally and *eo nomine*. If founded on title alone, it is known as petitory; if founded on a *primâ facie* title coupled with possession for seven years, it is said to be possessory; the main distinctions being that in the former case the pursuer must show a better title than any competitor in order to succeed, and must call not only the natural possessors (tenants), but the civil possessors; while in the latter case any *primâ facie* title is sufficient till it be reduced, and natural possessors alone need be called.²⁴ Questions of heritable title to land may thus be raised in a form which, though it may be inconvenient, can scarcely be deemed incompetent,²⁵ provided the

²¹ *Hendry v. Marshall*, 1878, 5 R. 687.

²² 5 R. 690, 691.

²³ *Ibid.* 693, 694 (consumption of straw; repair of drains; abatement of nuisance).

²⁴ *Skene*, 1512, M. 2226; *A. v. B.*, 1630, M. 2228; *Mudie v. Lightoun*, 1634, M. 2229; *Home*, 1665, M. 2231; *Halliburton v. Carse Tenants*, 1702, M. 2232; *St.* 4.22.14, 4.26.2; *Ersk.* 4.1.49; *MacKay*, Practice, ii. 308.

²⁵ See *Fairlie's Trs. v. Fairlie*, 1860, 22 D. 632 (validity of entail. L. Ivory and L. Deas thought such an action incompetent for the purpose; L. Curriehill, *contra*; but L. Deas mistook in regarding the action as possessory); and see a case which was practically a competition of services, *L. Heron*, 1760, 5 B.S. 876.

value of the estate be not such as to withdraw it from the protection of the Court in which the question arises.²⁶ Of course a purely possessory action can only result in a possessory judgment.

Title to sue.

The title to sue lies in the proprietor, or in any person who, holding an express or implied assignation of rents, is entitled to attain or maintain civil possession; such as a donee,²⁷ a life-renter by constitution, reservation, courtesy or terce;²⁸ a trustee voluntary or judicial; an adjudger;²⁹ a heritable creditor;³⁰ or an executor for rents falling under executry;³¹ but not a superior for his feu-duties, since his right to possess is excluded by his vassal's title.³² Infertment is not necessary.³³ A proprietor or a creditor holding an *ex facie* absolute disposition (who, though there be a back-bond or back-letter, is in the matter of title a proprietor) gains nothing in the way of *title* by raising an action of maills and duties 'for it is only an incumbrancer that requires 'to use a process of maills and duties in order to give him a 'title in a question with the tenant to uplift the rents;' and his infertment gives him civil possession.³⁴ A competent, and, if summary diligence is unavailable, the appropriate process where such a person is refused payment by the tenants, is an ordinary petitory action. The title of the pursuer of an action of maills and duties should be set forth as falling under one of the above categories, in the summons or condescendence or both. Thus, it was held to be not enough to design him as chief of a clan without libelling a title of property.³⁵

Courts.

The competent Courts are—the Court of Session for sums exceeding £25;³⁶ the Sheriff Court for sums of any amount—the proper forum where the sum does not exceed £12 being the Small-Debt Court,³⁷ and where the sum does not exceed £50,

²⁶ See *op. of L. Deas*, 22 D. 645; Sheriff Court Act, 40 & 41 Vict. c. 50, sect. 8.

²⁷ *St., Ersk., supra*, 24.

²⁸ *St. 4.22.8.9* (tercer without kenning); *A. v. B.*, 1632, M. 15842.

²⁹ *St., Ersk., supra*, 24; *Kames' Equity*, 436.

³⁰ This is the common case. As to annualrenters see cases in M. 565 *seqq.*; 2 B.S. 508, 3 B.S. 140; *Elchies, Annualrent*, No. 10; *Macdonald v. Macdonald's Trs.*, 1829, 7 S. 826.

³¹ *Lawson v. Ogilvy*, 1832, 10 S. 531, *aff. 7 W. and S. 397*. As to *pro indiviso* owners, see *Bell v. Gunn*, 1859, 21 D. 1008; *Lade v. Largs Baking Co.*, 1863, 2 M. 17.

³² *Prudential Ins. Co. v. Cheyne*, 1884, 11 R. 871.

³³ *Scott v. Whitslaid Tenants*, 1628, M. 207; *Moncrieff v. L. Balnagown*, 1629, 1 B.S. 292, 378; *Belshes v. Lowden Tenant*, 1686, 2 B.S. 95.

³⁴ *Per L.-P. Inglis in Sc. Heritable Sec. Co. v. Allan Campbell & Co.*, 1876, 3 R. 333, 340 ('an idle formality, and, indeed, incompetent').

³⁵ *Mackintosh v. Mackintosh*, 1835, 13 S. 884 (an amendment would now be allowed, 31 & 32 Vict. c. 100, sect. 29); *Hutchison v. Ferrier*, 1846, 8 D. 1228.

³⁶ 50 Geo. III. c. 112, sect. 28.

³⁷ 1 Vict. c. 41, sect. 2; *Lees, Small-Debt Handbook*, p. 28.

the Debts Recovery Court; ³⁸ Burgh Courts, whose jurisdiction is in this matter obsolete; ³⁹ Baron Courts, whose jurisdiction is saved by 20 Geo. II. c. 43, ⁴⁰ sect. 17, but is never exercised; and the Justice of Peace Court for sums not exceeding £5, ⁴¹ where the title is not disputed. ⁴²

The conclusion of the summons is for payment by the defenders (tenants or possessors ⁴³) of the rents, maills, and duties of their several possessions presently resting-owing by them, each his own part [specifying the rents], with legal interest for the term when the rents became due, and of the like sums half-yearly [or otherwise] thereafter, the terms of payment being always first come and bygone; ⁴⁴ at least [where the pursuer is a creditor] as much as will satisfy the debt due, interest, and penalties. Expenses are usually asked for as against the proprietor and such tenants as appear and oppose. ⁴⁵ If the pursuer be creditor in an annuity he may thus recover payment not only of arrears but of subsequent instalments. ⁴⁶

Conclusions
of summons.

A competition as to the right to rents may take the shape of a multiplepounding in which the tenants are the real or nominal raisers, and the fund *in medio* the rents actually due at the time, not future rents. ⁴⁷ This remedy is incompetent if there be no double distress. So where a petition for sequestration of an estate had been refused and the claimant in possession was entitled in a question with the real-raiser to the privileges of an apparent heir, an action of multiplepounding was dismissed, as it would have been just another mode of obtaining the sequestration which had been refused. ⁴⁸

Multiple-
pounding.

³⁸ 30 & 31 Vict. c. 96, sect. 3. House maills are mentioned, and agricultural and other rents seem to come under 'other the like debts'—Dove Wilson, Practice, 461.

³⁹ Law Courts Commission, iv. 38.

⁴⁰ 1699, c. 4; Balf. 40; St. 2.3.62; Mack. 1.4.11; Bankt. 4.16.1; Ersk. 1.4.25; Kidd v. Haliburton, 1570, M. 7539; Dennistoun v. M'Linto, 1630, M. 7545; A. and B., 1541, M. 7544; Merse Steward v. L. West Nisbet, 1622, M. 7299; 20 Geo. II. c. 43, sect. 17; Hay v. Gicht, 1634, M. 3782.

⁴¹ 6 Geo. IV. c. 48, sect. 2; Lees, p. 146.

⁴² Ibid., sect. 25; Lees, p. 166; Boyd v. Millers, 1768, M. 7617, Hailes, 267; Thomson v. Boyd, 1824, 2 S. 735 (N.E. 615).

⁴³ The character in which they are sued should be stated, Hutchison v. Ferrier, *supra*, ³⁵. See *supra*, p. 274, as to cases where there is possession but no lease. See as to adding the proprietor, *supra*, p. 319.

⁴⁴ Woodward v. Wilson, 1829, 7 S. 566.

⁴⁵ 3 Jur. Styles, 126; St. 4.22.15; Ersk. 4.1.49; Mackay, Practice, 310; M'Kechnie and Lyell, Styles, 166; Lees, Sheriff Court Styles, 40, 236.

⁴⁶ Bruce v. Grant, 1824, 2 S. 657 (N.E. 552)—an assignee; Davidson v. Douglas, 1839, 12 Sc. Jur. 211, 2 D. 159.

⁴⁷ Pentland v. Royal Exchange Ins. Co., 1830, 9 S. 164; Wallace v. L. Forrester, 1692, 4 B.S. 65.

⁴⁸ E. Wemyss v. Campbell (Breadalbane Ca.), 1864, 2 M. 461; see Scott v. Thom, 1838, 16 S. 1133.

SEQUESTRATION CONSEQUENT ON HYPOTHEC.

I. *Nature of the Right of Hypothec.*Hypothec,
quid?

By a right called hypothec which took its origin in the Roman Law,⁴⁹ and reached Scotland, by way of France⁵⁰ or Holland⁵¹ (passing by England and its law of distress⁵²) apparently early in the seventeenth century,⁵³ a landlord is, unless restrained by statute, entitled to have retained on the subjects let and to recover from creditors and purchasers the produce, raw or manufactured, of the subjects, and in certain cases other effects thereon situate. This right is *inter naturalia* of a lease—tacitly a part of the contract—and presupposes that the moveables which it attaches are neither the property⁵⁴ nor in the possession of the landlord. In this last respect hypothec differs from pledge and lien,⁵⁵ where there is possession by a creditor of a subject which belongs to his debtor; and from right of retention,⁵⁶ where a creditor has both possession of and right of property in a subject which he is entitled to withhold from his grantee till the latter satisfies debts due by him.⁵⁷ The law of Scotland is jealous (beyond other systems) of admitting securities over moveables without possession and, except in the cases of bottomry and *respondentia*,⁵⁸ declines to recognise express or conventional hypothecs,⁵⁹ ‘in order that commerce may be the more sure and every one may more easily know his condition with whom he contracts.’⁶⁰ Of the tacit or legal hypothecs known to the law,⁶¹ the most import-

Pledge : lien :
retention.

⁴⁹ 5 D. (20.1); 2-7 D. (20.2); Vangerow, Pandekten, §§ 363 seq.; Glück's Commentar, 18.161; Weiske's Rechtslexicon, 8.1.

⁵⁰ Pothier, Louage, sects. 226-269.

⁵¹ Voet, ii. 2-4.

⁵² Gilbert, Distress; Woodfall (18th ed.), ; distinguished from hypothec by L. Brougham in 4 W. and S. 418, 428.

⁵³ Wardlaw v. Mitchell, 1611, M. 6187 (privilege); Hay v. Keith, 1623, M. 6188 (hypothecated) and cases in the next few years, M. 6217 et seqq. The early notices and cases of distress (*Breve distractionis*) give no indication of the peculiarities of the civil law right of hypothec—Reg. Mag. 4.22; Quon. Attach. 49; 1 Rob. I. c. 7; Dav. II. c. 6; Rob. III. c. 12; Balf. 398 and cases there; Cr. 2.10.11; 2.19.32; 3.2.21; Kames' Tracts, 145, 149, 169, seq.; 2 Ross' Lect. 392, seqq.; 1469, c. 36; 1503, c. 98.

⁵⁴ The authorities in last note and esp. the Act 1469, c. 36, suggest (what is otherwise certain) that the original view taken of the chattels possessed by the old service tenants was that they became *situ* the property of the lord, if indeed they were not his originally and granted out with the land; see esp. Kames, *supra*, p. 150.

⁵⁵ Cf. Alison v. Campbell's Creds., 1748, M. 6246, with Preston v. Gregor, 1845, 7 D. 942; 2 B.C. 29.

⁵⁶ To be distinguished from the right of retention in virtue of hypothec, *infra*, p. 342.

⁵⁷ 2 B.C. 91; More's Notes, 131.

⁵⁸ B. Pr. 452, 1386.

⁵⁹ Reg. Maj. 3.3; Balf. 194; St. 1.13.14; 4.25; Ersk. 3.1.34; 2 B.C. 26.

⁶⁰ St. 1.13.14.

⁶¹ Superiors'; law-agents'; maritime hypothecs are the others.

ant is still the landlord's hypothec,⁶² though its range and scope have been greatly curtailed by recent legislation. The existence of hypothecs is only justified by expediency and the common advantage of the parties; and these can only co-exist where the *nexus* takes its origin in a custom⁶³ known to every one, and does nothing to interrupt the ordinary use and employment of the thing hypothecated.⁶⁴

In so far as a landlord is not secured by hypothec, he is placed on the same footing in regard to the recovery of rent and the enforcement of other prestations in the lease as an ordinary creditor in regard to the recovery of a debt.⁶⁵

The purpose of the attachment is to secure the payment of Debts secured. rent. It has been held by a narrow majority that not only the fixed rent stipulated in a lease, but pactional rent payable in case of divergence from prescribed management is thus favoured,⁶⁶ but the decision has not been regarded as final.⁶⁷ Interest payable by a tenant on improvement money laid out on the land let, though for purposes of valuation regarded as equivalent to rent, can scarcely be viewed as rent in the present relation, if the amount may vary according to the actual expenditure.⁶⁸ But it would be difficult to draw any distinction in principle between rent and interest on a sum which the landlord binds himself to pay and does pay to his tenant at entry, to be expended on improvements. In the one case the debt is uncertain in amount, in the other case certain, apparent *ex facie* of the lease, and therefore such as persons having dealings with the tenant may fairly be called on to make their account with.

II. Parties having Right of Hypothec.

The right of hypothec lies with the landlord; his assignee to Parties in rent⁶⁹ (as accessory to the assignation) in so far as the cedent is right. himself entitled;⁷⁰ a cautioner for rent who has obtained (as he is entitled to obtain) an assignation in relief on paying rent for

⁶² St. *supra*,⁶⁰; Mack. 2.6.12; 3.1.14; Bankt. 1.18.7; Ersk. 2.6.56; B. Pr. 1234 *et seq.*

⁶³ The Act 8 Anne, c. 16, does not extend to Scotland—Cunnison v. Somerville, 1723, M. 6240.

⁶⁴ B. Pr. 1387.

⁶⁵ Thomson v. Christie, 1858, 20 D. 1256.

⁶⁶ Robertson v. Clerk, 1842, 4 D. 1317.

⁶⁷ Witham v. White, 1866, 38 Sc. Jur. 586.

⁶⁸ See cases in Guthrie's Dec. 305, 309; and as to recovery of improvement rent-charge, 27 & 28 Vict. c. 114, sects. 63, 67. What of royalties?—see *infra*, p. 334.

⁶⁹ St. 1.13.15, 4.25; Ersk. 2.6.56; More's Notes, 83; see Edinburgh Town v. Provan's Creds., 1665, M. 6235, *infra*,⁹¹

⁷⁰ Wedderburn v. Man, 1707, M. 10399.

the tenant;⁷¹ an adjudger infest and using diligence to attain possession, but not otherwise;⁷² a heritable creditor infest and in possession, but not otherwise.⁷³ If the subjects are owned *pro indiviso* or by joint-proprietors the hypothec pertains to them all as a body, not to any one of them separately,⁷⁴ though if one of several *pro indiviso* owners proceeds on the hypothec in order to secure his share of the rents, the faulty instance may be cured by obtaining the concurrence of the others.⁷⁵ If the subjects are held under one lease from the same proprietor, who as to part holds on one tenure, and as to the rest on another (as for example on fee-simple and entail) the rent (though for the purposes of an ultimate severance of the unity of ownership it be apportioned between the two parts), is regarded as indivisible in respect to hypothec, and may all be secured by sequestration of the whole moveables situated on both parts.⁷⁶ Third parties other than cautioners cannot demand an assignation to the hypothec on paying rents in place of the tenant, unless they can show clearly that no prejudice can be done thereby to the landlord's rights and remedies.⁷⁷ Thus, where a landlord had sequestrated cattle belonging to a grazier who had taken grass-parks from the tenant for the season and had prepaid his sub-rent to him, it was held that the grazier on consigning his rent (and thus paying it over again) was not entitled to demand an assignation of the hypothec, since he was unable to show that the landlord would not be prejudiced thereby.⁷⁸ It was held, in a case of very special circumstances, that a creditor who paid his debtor's rent, and on his absconding let the premises for the rest of the term to a third party, was entitled to sequester the goods of the latter for rent⁷⁹—probably on the *ratio* that the creditor's assumption of the powers of a lessor could not be quarrelled by a party who had no title except through him.⁸⁰ A liferenter in

⁷¹ *Stewart v. Bell*, 31st May, 1814, F.C. 638, and next vol. p. 499; 2 B.C. 33; B. Pr. 1238, 1243, and *infra*, p. 361.

⁷² *St. v. Ersk.*⁶⁹; B. Pr. 1243; *E. Panmure v. Collison*, 1675, M. 14088 (an intimated assignation and an arrestment preferred).

⁷³ *Railton v. Muirhead*, 1834, 12 S. 557. In *Hoods v. Martin's Creds.*, 1835, 13 S. 923, the process should have been a pointing of the ground, since the debtor himself was in possession.

⁷⁴ *Stewart v. Wand*, 1842, 4 D. 622.

⁷⁵ *Ibid.* (though the concurren).

⁷⁶ *Meek v. Smith*, 1832, 10 S. 652

(everything except one harrow was on the entailed portion).

⁷⁷ See *Guthrie v. Smith*, 1880, 8 R. 107, *per* L.P. Inglis, p. 111; B. Pr. 557, and cases there.

⁷⁸ *Steuart v. Stables*, 1878, 5 R. 1024 (on the contrary, he would have been prejudiced by losing the *nexus* for second half-year's rent).

⁷⁹ *Bannatyne v. Finlayson*, 1824, 2 S. 751 (N.E. 625), apart from an assignation, which did not affect the decision.

⁸⁰ The judgment is open to grave doubt.

possession, not the *fiar*, is in the ordinary case the holder of the right of hypothec; but it was different where the subjects life-rented were under lease at the opening of the succession, and the rents were directed, so long as the lease endured, to be paid to the *fiar*, who was burdened with an annuity to the liferenter in lieu of the rents.⁸¹

But in order to the establishment of hypothec, there must *in* Parties to a *bond fide* lease. *bond fide* exist between the parties the relation of landlord and tenant, not a mere device to create a security over moveables, such as is not otherwise recognised in the law of Scotland. Money was lent to shipbuilders on—(1) an absolute disposition of their building-yard and moveable property therein, duly recorded in the Register of Sasines; (2) a personal bond for payment of interest on the loan, and for repayment of the capital by instalments; (3) a lease back to the borrowers at a rent much higher than the annual value of the subjects as appearing in the Valuation Roll; and (4) an agreement setting forth that the disposition was only in security, and that the rent was not to be paid over and above the interest and instalments, but was to be ascribed to payment of these *pro tanto*. There was no change of possession. The borrowers became bankrupt; and the lenders sequestrated the *invecta et illata*, as coming under their alleged right of hypothec. A majority of the Second Division denied them this remedy, either for the exorbitant rent as it stood, or for a fair rent such as might be fixed. Lord Young dissented, and regarded the transaction as a legitimate mode of obtaining possession over and above the symbolical possession achieved by infestment.⁸² The view taken by the majority seems to be the more consonant with the Scottish law of securities over moveable property.⁸³

III. *Leases under which Hypothec is and is not Available.*

Leases of urban subjects—dwelling-houses in town or country, shops, factories, and warehouses⁸⁴—and of mines, quarries,⁸⁵ and fisheries,⁸⁶ being unaffected by recent legislation, tacitly convey or reserve to the landlord a right of hypothec or security for payment of rent. There can be little hesitation in accepting the view of a majority of the Court in a case decided near the end of last century, that there is no hypothec implied in a con-

Urban tenements.

Mines: fisheries.

⁸¹ *Zuill v. Buchanan*, 1833, 11 S. 682.

(decided on *ratio* of excessive rent).

⁸² *Heritable Sec. Investment Assoc. v. Wingate & Co.'s Tr.*, 1880, 7 R. 1094. The English case referred to by L. Craig-hill is *Jackson v. Bowes*, 14 Ch.D. 725

⁸³ *Supra*, p. 168.

⁸⁴ *Infra*, p. 332.

⁸⁵ *Infra*, p. 333.

⁸⁶ *Infra*, p. 334.

Timber.	tract of wood-cutting, which only differed from an ordinary sale in contemplating the continuance of the work for years, and providing for the payment of the price by annual instalments. ⁸⁷
Water-power.	It may be assumed that a lease of water-power merely—not as adjunct to a mill or factory let together with it and for a lump
Steam-power.	rent—would not, and it has been decided that a lease of steam-power in similar circumstances does not, carry with it a right of hypothec—the contract in each case being location, not lease, and separable. ⁸⁸ But if the two contracts are one and indivisible, and especially if one rent only is reserved, the accessorial follows the principal right, and the hypothec applies to the whole. ⁸⁹ It
Game.	would appear that game rents are not secured by hypothec, ⁹⁰ where the right conveyed in the lease is merely a privilege of sporting over lands occupied for other purposes by other persons; but the contrary would probably be held, if the lands themselves are let, though the known or avowed purpose be to occupy them as a deer-forest or solely or mainly for other sporting purposes. There is neither authority nor, it would seem, analogy in favour of the existence of a hypothec in leases of ferries, customs, and similar <i>jura incorporalia</i> . ⁹¹
Farms.	The right of hypothec which was the landlord's principal security for payment of rent in all leases of agricultural or pastoral subjects was unrestricted in its range (though the severity of its operation was in 1867 ⁹² relaxed in the interests of the ordinary creditors of a tenant) down to the year 1880. In that year the result of long-continued agitation was the passing of the Hypothec Abolition (Scotland) Act, ⁹³ which (so far as not repealed)
Hypothec Abolition Act, 1880.	runs in the following terms :—

‘ From and after the 4th day of November 1881, hereinafter called ‘ the commencement of this Act, the landlord's right of hypothec for the ‘ rent of land, including the rent of any buildings thereon, exceeding two ‘ acres in extent let for agriculture or pasture, shall cease and determine ; ‘ provided that nothing herein contained shall apply to any claim for rent ‘ due or which may hereafter become due under any lease, writing, or ‘ bargain current at the date of the commencement of this Act ’ (sect. 1).

⁸⁷ *Muirhead v. Drummond*, 1792, 2 B.C. 28. The case of mines is closely analogous, but see *infra*, p. 333 ; and Mr. Hunter's doubts, ii. 361 ; but the reasoning of L.J.-C. Macqueen is cogent, and sufficiently distinguishes the cases.

⁸⁸ *Catterns v. Tennant*, 1834, 12 S. 686, rev. 1 S. and M'L. 694 (rubric erroneous). See *supra*, p. 254 ; *Sandeman v.*

Thomson, 1866, Guthrie's Dec. 75.

⁸⁹ *Ibid.*

⁹⁰ *Infra*, chap. xviii.

⁹¹ *Edinburgh Town v. Provan's Creds.*, 1665, M. 6235, even if sound was not a case of hypothec ; but see *More's Notes*, 84.

⁹² 30 & 31 Vict. c. 42.

⁹³ 43 Vict. c. 12 (24th March 1880).

This enactment was followed by provisions (sects. 2, 3) for accelerating and facilitating the removal of tenants in arrear with their rents under leases to which the Act applied. These provisions have now been repealed and others substituted by the Agricultural Holdings (Scotland) Act, 1883,⁹⁴ as will be more fully explained in the sequel.⁹⁵

The scope of the abolition is restricted in three directions. Its scope.
 (1) The extent of the subjects to which alone the Act applies is Size of farms.
 over two acres. (2) The purposes for which they are let must Purpose of
 be agriculture or pasture ; and, since in the eye of the law a farm letting.
 must be either one or the other,⁹⁶ farms which as matter of fact are occupied for both of these purposes are unquestionably included. It is no bar to the operation of the Act that the rent is partly paid for the occupation of buildings on the farm. But Policies.
 it would probably be held that premises attached to dwelling-houses, as lawns, policies, parks, and the like, not let for, but actually used in, the rearing of stock or raising of crops and intended purely as accessories to the dwellings are outwith the statute, even though extending beyond two acres. The question may be one of circumstances ; but the analogy of gardens and orchards used for raising fruits and vegetables (which are undoubtedly exempted) seems stronger than that of farm-holdings. It would be to run counter to the ordinary use of words and to the nomenclature of a later Act *in pari materia*⁹⁷ to regard Nursery and
 nursery or market gardens, however extensive, as agricultural or market gar-
 pastoral subjects, and (though the point has been considered dens.
 doubtful⁹⁸) practice and sound theory seem to concur in holding that the landlord of such gardens retains his right of hypothec.⁹⁹
 (3) The act does not apply to any claim for rent due under a Date of lease.
 lease, writing, or bargain current at Martinmas 1881. There are, therefore, many agricultural and pastoral leases which are still affected by hypothec ; and it is still necessary to examine a large mass of lease law which must in a few years become obsolete. The only question which has caused difficulty has been whether hypothec subsists where there has been possession on a verbal or informal bargain or on an understanding at and from a date before Martinmas 1881, while the formal lease is dated subsequently to that term-day, though with a declaration that ' notwithstanding ' the date hereof ' the duration shall be held as running from

⁹⁴ 46 & 47 Vict. c. 62, sect. 27.

Vict. c. 62, sect. 30.

⁹⁵ *Infra*, chap. xx.

⁹⁸ *Begbie v. Boyd*, 1836, 16 S. 232.

⁹⁶ *Supra*, p. 303.

⁹⁹ See 2 Hunter, 352 ; and *infra*, p.

⁹⁷ Agricultural Holdings Act, 46 & 47

336.

the actual term of entry. Leases of this description are not uncommon. The words of the section are probably wide enough to allow the Court to give effect to the real date of the commencement of the relation of tenancy, though the lease 'under' which possession is held bears to be executed at a later period. The question has arisen in the Sheriff Court whether hypothec subsists where a lease dated before Martinmas 1881 has run out and the tenant sits on by tacit relocation. The sound view seems to be that an affirmative reply would enable landlord and tenant (in agreement and it may be on terms) to evade the Act to the prejudice of the ordinary creditors of the latter.

IV. *Subject-Matter of Hypothec.*

1. *In Urban Tenements.*

Beginning with the simplest and now also the most important case, the subjects affected by the landlord's right of hypothec in urban tenements—dwelling-houses, shops, mills, factories, warehouses, and buildings generally which are not merely accessories to more important holdings—are all the *invecta et illata*, goods brought into the premises.¹⁰⁰

Invecta et illata.

The main illustrations of this rule have arisen under leases of dwelling-houses. Its universality is indicated but not confined by the statement that hypothec extends to all furniture, books, paintings, plate, jewels, and other moveable property brought into the house and not belonging to the landlord,¹⁰¹ the presumption from possession being that they belong to the tenant.¹⁰² The chief difficulty has been in determining whether certain exceptions exist, and whether, if so, these exceptions apply in particular cases. The exemptions which have been recognised result either from peculiarities in the nature of certain articles, or from their being proved not to be the property of the tenant.

Cash and documents of debt.

The statement has long stood unchallenged in a book of authority, that 'cash, bonds, bills, and other documents of debt' are not comprehended in the *invecta et illata*;¹⁰³ and this view seems to spring naturally from the circumstance that, being no part of the plenishing of the house, these articles do not add

¹⁰⁰ St. 1.13.15; 4.26.2; Mack. 2.6.12; Bankt. 2.17.10; Ersk. 2.6.64; 2 B.C. 30; B. Pr. 1275.

¹⁰¹ See *supra*, p. 257 *seq.*, as to fixtures.

¹⁰² St. 2.1.42; Ersk. 2.1.20; 1 B.C. 254 *seq.*; B. Pr. 114, 1313; Bell v. Andrews,

1885, 12 R. 961, 962. Blackwood v. Alexander, 1678, 2 B.S. 228, which gave effect to an instrument of possession, *retentâ possessione*, is not now law.

¹⁰³ B. Pr. 1276; and see 2 Hunter, 354.

to the tenant's visible wealth situate on the premises.¹⁰⁴ The same authority lays down broadly that wearing apparel is not comprehended,¹⁰⁵ and the understanding of the country is said to be to that effect.¹⁰⁶ The reason given is insufficient, being rejected in the case of shop goods, viz., that, as in the Roman law, only those articles are affected which are meant to remain permanently in the house.¹⁰⁷ In the only Scotch case in which any question regarding apparel was raised, the objection taken was not as regarded the nature of the articles, but that a guest and not the tenant was their owner.¹⁰⁸ It seems to follow that in the beginning of last century it would have been hopeless to argue for the total exemption of wearing apparel. Probably, if the question arose, an attempt would be made to discriminate between clothes necessary or proper for the daily use of the tenant and his family, taking into consideration their station in life, and superfluous clothing, curious or intrinsically valuable garments laid by, and the like.

Delicate questions have arisen regarding the liability of goods *Res alienae*. belonging to persons other than the tenant, but brought into the premises let. Though there is a presumption from possession that moveables belong to the possessor, the contrary may be proved, and then since 'a man cannot pledge property which is 'not his own—*res aliena pignori dari non potest*—all the cases 'in which hypothec is admitted are exceptions from that rule, 'and proceed on the presumption of the consent of the real 'owner by the possession voluntarily given,¹⁰⁹ and the title of 'such possession as implying such consent.'¹¹⁰ This consent, which really means that the owner agrees to keep the law, is an unsatisfactory explanation¹¹¹ involving a *petitio principii*, but no

¹⁰⁴ The two main channels through which the law of hypothec seems to have reached Scotland differ. French custom rejects, Dutch custom admits hypothec as applicable to these articles, Pothier, Louage, § 250; Voet, Pandec. 20.2.4. The English law is said to be against distraint of money, 'except it is in a bag, 'for then the knowledge of the bag 'secures the several pieces of money 'therein, so as the same individual pieces 'may be restored,' Gilbert, Distress, 34.

¹⁰⁵ B. Pr. 1276.

¹⁰⁶ More's Notes, 83 (the words are ambiguous, however).

¹⁰⁷ 2 B.C. 30; 7 § 1 D. (20.2)—*ut ibi sint*. Dutch custom and French again

differ in the same directions, Voet, *ut sup.* ¹⁰⁴; Pothier, § 245. English law admits distress of everything not in actual use at the time, though laid aside only during sleep, Bisset v. Caldwell, Peake's Ca. 36; Baynes v. Smith, 1 Esp. 206.

¹⁰⁸ Cs. Callander v. Campbell, 1703, M. 6244.

¹⁰⁹ Not if the goods were detained against their owner's will, Jaffray v. Carrick, 1836, 15 S. 43.

¹¹⁰ *Per* Lord Moncreiff (I.) in Jaffray v. Carrick, ¹⁰⁹.

¹¹¹ *Per* L. Shand in Bell v. Andrews, *supra*, ¹⁰², 12 R. 964.

better is forthcoming;¹¹² and the safest course is to follow, as closely as possible, the decided cases without too close a scrutiny into principles. The three leading categories are loan on hire, loan gratuitously, and ownership by inmates.

Loan for hire. The case of loan for hire is the most favourable for the landlord, there being the further presumption that the lender's risk was calculated in fixing the hire;¹¹³ and such is said to be the understanding of furniture brokers.¹¹⁴ The rule of liability applies most strongly where the whole,¹¹⁵ and with sufficient force when a substantial part, of the furniture is hired,¹¹⁶ the *ratio* being that the landlord looked to the plenishing as a whole to secure the rent, and would have been entitled to call for sufficient plenishing, if there had been any deficiency in that respect. It is thought that this reason does not extend to single articles, not in the nature of ordinary furniture; especially if there is a known custom of hiring out similar articles by themselves and as part of a business different from furniture-broking, as in the case of sewing-machines¹¹⁷ and musical instruments such as pianofortes.¹¹⁸ Another exception has been suggested by a high authority, as arising in cases where the hiring is purely occasional and transient. 'I am not aware,' says Lord Deas, 'of any authority for holding that forms hired for an evening party or china for a dinner party, may be sold for payment of the rent, although they happen to be in the house on the day sequestration is used.'¹¹⁹

Deposited or
gratuitously
lent.

The case for the landlord is weaker when the goods are merely deposited in the premises let, or lent gratuitously. But there seems to be nothing in the mere absence of consideration passing from the tenant of the premises to the owner of the *invecta et illata* to distinguish such a case from those already noticed.¹²⁰ In the earliest case where the point occurred, the reporter (Foun-

¹¹² Bankt. 1.17.10; B. Pr. 1276; 2 B.C. 31; *per* L.P. Inglis in *Bell v. Andrews*, 12 R. 962. L.J.-C. Moncreiff's criterion of subserviency to the tenant's use seems too vague for practical purposes—*Gracie v. Pulsometer Co.*, 1887, 24 Sc. L.R. 239. Sheriff Guthrie's epitome of the law there may be consulted with advantage.

¹¹³ 2 B.C. 31; *Wauchope v. Gall*, 1805, there and in *Hume* 227.

¹¹⁴ *Ibid.*; see *Cowan v. Perry* there. In France and England the law is the same, *Pothier, Louage*, § 241; *Woodfall*, p. 435.

¹¹⁵ *Wauchope*, *supra*, ¹¹³; *Nelmes & Co. v. Ewing*, 1883, 11 R. 193.

¹¹⁶ *Stewart v. Bell*, 31st May 1814, F.C. 638, and 18 F.C. 499.

¹¹⁷ See Sheriff Court cases cited in B. Pr. 1276 (8th ed.), from 25 *Journ. of Jurisp.* 499; *ibid.* 26, 445; 28, 277, 498, 658; 30, 658; and the rules as to custom in *Marston v. Kerr's Tr.*, 1879, 6 R. 898.

¹¹⁸ *Penson*, 6th June 1820, F.C. 147, which is *contra* is (it is thought justly), doubted by L. Shand in *Bell v. Andrews*, 12 R. 964.

¹¹⁹ In *Adam v. Sutherland*, 1863, 2 M. 6, 8.

¹²⁰ See *Pothier, Louage*, 246, *Voet ad Pand.* 20.2.5; *Woodfall*, 445.

tainhall) gives an opinion in favour of exemption, but his words are wide enough, and he probably meant, to apply the exemption to all goods not being the tenant's property.¹²¹ In the next case, furniture lent without hire, and placed in a country house along with hired furniture, was held not to be affected by hypothec; but in the note of the case, which has been preserved, the grounds of judgment are not given.¹²² A later judgment subjected to hypothec furniture gratuitously allowed by the creditors of its bankrupt owner to remain in the house which he held on lease, and this conclusion was reached, after a reference to all the earlier cases, and as a decision on the general question apart from specialties.¹²³ If, as seems to be the case, this decision be sound, the general rule would doubtless be subject to the qualifications, set out in last paragraph, in regard to single specific articles and to casual use; since the same grounds—the credit given to the possession of visible goods and the necessity for a sufficient plenishing—are open to the same exceptions in both cases. And circumstances may reveal special cause for exemption. Thus, where previous to a sale of furniture under Crown diligence, the debtor absconded, and after the sale the purchaser allowed it to remain for the use of the debtor's wife and family, it was held to have been freed from hypothec by the sale, and not to have been reaffected with it when nine weeks later the landlord sequestered it for the rent of the current year.¹²⁴ The *ratio* was that no false credit could be created in the circumstances (which were known to the landlord), whether the furniture was left out of compassion, or for the convenience of the purchaser, or for the common convenience of him and the debtor's family.

The case for the landlord is weakest where the goods sought to be attached are the property of inmates—children, guests, lodgers, servants, and the like. It is thought that in no circumstances which are easily conceivable would the landlord have any right of hypothec therein. In most cases the effects are isolated specific articles of personal rather than of household use, not part of the plenishing to which credit is usually given; and, if

Property of inmates.

¹²¹ 1672, 2 B.C. 670.

¹²² *Cowan v. Perry*, 1804, 2 B.C. 31. In the next case it is said that the ground was that the hired furniture (the owner of which raised no question) sufficed. If this were so, the sequestration was nimious.

¹²³ *Wilson v. Spankie*, 17th Dec. 1813,

F.C. 494; 12th Nov. 1814, F.C. 3. The point was raised but not decided in *Jaffray v. Carrick*, 18th Nov. 1836, F.C. 40; 15 S. 43; 9 Sc. Jur. 22; see L.O.'s note. Wilson's case is approved by L.P. Inglis in *Bell v. Andrews*, *supra*, ¹⁰², 12 R. 963; and B. Pr. 1276; but see 2 B.C. 31, note.

¹²⁴ *Adam v. Sutherland*, 1863, 2 M. 6.

a so-called lodger brings in furniture materially different and more various, the question will arise whether he be not rather a subtenant, subject to all the obligations springing out of a sublease. There could be no doubt now, as there was in the beginning of last century, whether a guest's clothes were or were not attachable.¹²⁵ A pianoforte, which belonged to the daughter of a tenant, and was kept within the premises let, was decided not to be affected by the landlord's hypothec.¹²⁶

Business
premises.

Where the subject let is a shop, warehouse, mill, or factory, the rule is that the hypothec extends not only to the furnishings, utensils, machinery, and instruments of trade and manufacture belonging to the tenant or to persons other than the landlord, but also to the materials intended to be made up, and the goods in stock intended for sale or hire;¹²⁷ provided that, at the time in question, that relation of landlord and tenant subsisted on which alone hypothec can be claimed.¹²⁸

Furnishings.

The rules regulating the liability to attachment of the first class of subjects (furnishings) do not seem to differ from those which obtain in the case of

Goods in stock.

dwelling-houses. But, in regard to the second class, a modification of the strict rule naturally results from the circumstance that the goods are on the premises for no other purpose than to be disposed of by sale or hire, either without or after some process of manufacture or repair. The reasonable result seems to be:—(1) With regard to goods not belonging to the tenant, that 'though found in a manufacturer's house, or workshop, or warehouse, they are not included in the hypothec';¹²⁹ that the effects 'belonging to travellers in an inn or hotel are not subject to hypothec for the rent of the inn';¹³⁰ and that the stricter rule suggested above as to deposits here falls away along with the presumption on which it is founded. (2) Goods, whether belonging to the tenant, or intrusted to him for sale, are freely vendible till landlord's sequestration takes place, *bond fide* purchasers being secured from the operation of the hypothec till then. It has been well suggested that they would be safe

¹²⁵ *Cs. Callander v. Campbell*, 1703, M. 6244; see *Ersk.* 2.6.64; 2 B.C. 30, note.

¹²⁶ *Bell v. Andrews*, *supra*, ¹⁰². Lodgers' goods are specially exempted from distress in England by 34 & 35 Vict. c. 79, on declaration made.

¹²⁷ *Bankt.* 1.17.11; *Ersk.* 2.6.64; 2 B.C. 31; B. Pr. 1276; 1 *Bell*, Leases, 387.

¹²⁸ *Girdwood & Co. v. Wilson*, 1834, 12 S. 576 (machinery left after ish).

¹²⁹ In *Girdwood & Co. v. Pollock*, *Gilmour & Co.*, 1827, 5 S. 507 (N.E. 477) the question of hypothec was not reached.

¹³⁰ 2 B.C. 31; B. Pr. 1276; *Ivory's* Note to *Ersk.* 2.6.64; 2 *Hunter*, 358; *Pothier*, Louage, § 245.

even after sequestration, and that the only trustworthy mode of preventing dilapidation of the security would be by obtaining the closing of the premises under judicial warrant or removal of the sequestered goods.¹³¹ And (3) where large quantities of goods (relatively to the whole contents of a shop), are entrusted to a shopkeeper for sale, so as to induce a false credit, the stricter rule as to deposits may be presumed to hold as strongly as in regard to household furniture.¹³² Business books are not subject to hypothec to the effect of entitling the landlord to levy the debts.¹³³

2. *In Mines and Quarries.*

There can be little doubt that the ordinary contract of letting mines and quarries is regarded as a lease to the effect of inferring the right of hypothec,¹³⁴ and that these subjects are regarded as manufacturing concerns, so that not only the produce (as to which no doubt has ever been moved), but the machinery and implements (as to which Mr. Hunter was more than doubtful),¹³⁵ are liable to attachment.¹³⁶ Thus, where not only minerals output, and goods in a shop leased along with a mine, but machinery and implements were sequestered, no doubt was expressed as to the comprehension of the hypothec, the only question being whether the terms of the petition for sequestration were wide enough to include the *invecta et illata*.¹³⁷ And, a tenant of a quarry having delivered waggons to a creditor to be retained till payment of the debt, while it was held that the landlord could not revindicate and sequester them in virtue of his hypothec, on the grounds that his diligence came too late and that the delivery and receipt were *in bonâ fide* with no intent to disappoint the hypothec, yet it was taken to be 'clear from the 'authority of the text-writers and the decisions in analogous 'cases that the landlord of a quarry has a hypothec over the 'implements used by the tenant in working it, as *invecta et*

¹³¹ More's Notes, 83 ; 2 Hunter, 358.

¹³² 2 Hunter, 358. It is thought, however, that fraud, or gross negligence approaching to fraud, in letting down the effective stock in hand would have to be shown, as well as the depositor's cognisance thereof ; and something might turn on the custom of trade (e.g., jeweller's goods sent on sale or return).

¹³³ B. Pr. 1276 ; 2 Hunter, 358.

¹³⁴ Weir's Exrs. v. Durham, 1870, 8 M. 725, 728, 730, per L. Deas.

¹³⁵ ii. 359. The doubt proceeded on

the unfounded assumption that in order to come under the rule, these subjects must be *predia urbana*, and on the hazardous view that machinery, railway plant, barges, and ships could not be *invecta et illata*. These doubts were adduced and ignored in Lindsay v. E. Wemyss, 1872, 10 M. 708.

¹³⁶ They are classed with mills and breweries in Ersk. 2.6.64 ; followed in 1 Bell, Leases, 387.

¹³⁷ Lindsay v. E. Wemyss, *supra*, ¹³⁵.

'*illata* for payment of his rent,'¹³⁸ For reasons adduced on another page, it seems very questionable whether a royalty can be secured by hypothec beyond the amount of the fixed rent.¹³⁹

3. *In Fisheries.*

It is undoubted that here also hypothec obtains, and that it affects the produce—the fish taken.¹⁴⁰ It may be fairly argued on the analogy of the foregoing paragraphs that it extends also to the boats and other utensils.

4. *In Agricultural and Pastoral Subjects.*¹⁴¹

Articles excluded by Amendment Act, 1867.

By the 6th section of the Hypothec Amendment (Scotland) Act, 1867,¹⁴² the following articles were excluded from sequestrations for the rent of any farm or lands¹⁴³—viz., absolutely, household furniture or furnishings and agricultural implements;¹⁴⁴ and, if not brought upon the premises in fulfilment of a specific obligation in the lease, imported manure, lime, drain-tiles, feeding-stuffs, and other material not being the produce of or made upon the farm or lands and not at the time incorporated with the soil or consumed or otherwise applied to the purposes for which such material may have been procured.¹⁴⁵ It was perhaps intended by the legislature to confine the scope of the hypothec in such subjects to the produce and stocking of the lands. If so, the term 'agricultural implements' was ill chosen for the purpose of including such buildings, fences, and other erections as are neither implements in the ordinary sense of the word, nor by annexation the property of the landlord.¹⁴⁶ If it had been intended to confine the right to produce, it would have been easy to say so; and the fair conclusion seems to be that tenants' fixtures are not exempt from hypothec.

Produce and stocking.

However this may be, the moveables which are most readily

¹³⁸ *Tennent v. M'Brayne*, 1833, 11 S. 471 (*per* L.O. Corehouse, and not repudiated by the Inner House in adhering to his judgment).

¹³⁹ *Supra*, p. 323.

¹⁴⁰ St. 1.13.15; Bankt. 1.17.10; More's Notes, 84; *Cumming v. Lumsden*, 1667, M. 6237 (intromitter with fish liable); *Mollison v. Smith*, 1687, M. 6239.

¹⁴¹ Under leases current at 11th Nov. 1881. See *supra*, p. 326.

¹⁴² 30 & 31 Vict. c. 42. Appx. No. iii.

¹⁴³ For the definition of these words see sect. 1. Shortly stated, they mean subjects the primary use of which is the raising of agricultural produce or the

raising and rearing of live-stock.

¹⁴⁴ See an interesting discussion, thus superseded in 2 Hunter, 348. The authorities there cited are to be found in Dirl. 222; St. 1.13.15; 4.25; Mack. 4.6.12; Bankt. 1.20.10; Ersk. 2.6.57; 1 Bell, Leases, 385; 2 B.C. 29; B. Pr. 1235; D. (1.4); Voet, Pand. 20.2.2; Pothier, Louage, 228; Gilbert, Distress, 36; Woodfall, 449; and cases in Mor. 6188, 6203, 6205, 6221, 6246; Elch. Hypothec, 10, 13, and Ann. to Stair, 79; 16th Jan. 1810, F.C. 487; 10 D. 1489; 12 D. 65; 17 Sc. Jur. 271.

¹⁴⁵ The last clause seems redundant.

¹⁴⁶ As to which see *supra*, on Fixture p. 260.

available are the produce and stocking of the farm ; in dairy farms (including farms where there is a bowing of cows), the stock and the cheeses ;¹⁴⁷ in pastoral farms, the stocking (and crop if there be any) ; in arable farms, the crop and stocking. In regard to the stocking it is now provided by statute¹⁴⁸ that if sheep, cattle, or other live stock belonging to any person other than the tenant have been received on any farm or lands to be grazed or fed for a *bond fide* payment equal to the just value of such grazing or feeding they shall be liable to hypothec to the extent of the amount of such payment and no further ; that, so long as any portion of them remains on the farm or lands the hypothec shall continue over it to the full extent of that payment ; and that in the event of the removal of the stock or any portion thereof the hypothec shall, so long as the payment or any part thereof shall remain undischarged, continue to apply to the stock to the extent of the amount of the payment or such part thereof as shall be unpaid.¹⁴⁹ The effect of this enactment is to recognize the existence of a right of hypothec over such stock ; to confine it to securing payment to the landlord of the whole grass (or turnip) maill ; to continue it in force for the full maill, whether prepaid or not, over any alien stock so long as it remains on the land ; and to continue it in force for unpaid maill even after the stock is removed. In so far as it recognizes a right of hypothec over such stock, this enactment seems to be merely declaratory of the previously existing law—which had been erroneously supposed to deny right of hypothec over alien stock and to reach an equivalent result by feigning a preference over the grass maill, secured by a supposed communication of the tenant's lien over that stock¹⁵⁰—and to be in full conformity with the rules as to subleases.¹⁵¹ The only live-stock on a farm about which a doubt has been moved, are the work-horses ; but it is now settled that they are subject to the hypothec, though if there were plenty of other effects, the Court might interfere to prevent the sale of such horses as were necessary for the proper working of the farm.¹⁵² The right of hypothec infers a preference over the whole stock for the time being, though not applied in the con-

Stocking of
third parties.

Work-horses.

¹⁴⁷ Goldie v. Oswald, 1839, 1 D. 426.

¹⁴⁸ 30 & 31 Vict. c. 42, sect. 5, *infra*, Appx. No. iii.

¹⁴⁹ See Steuart v. Stables, 1878, 5 R. 1024.

¹⁵⁰ Ersk. 2.6.63 ; 2 B.C. 29. These passages are not supported by the cases referred to—Brown v. Sinclair, 1724, M.

6204 ; M'Kye v. Nabony, 1780, M. 6214.

See the cases as to obligation to plenish, *infra*, p. 351. The sound view (adopted by the statute) is taken in Bankt. 1.17.10 ; see Ross v. Williamson, 1817, Hume 232.

¹⁵¹ *Infra*, p. 350.

¹⁵² Henderson v. Warden, 1847, 17 Sc. Jur. 271.

crete to individual animals, and any creditor other than the landlord attaches by diligence the estate of the tenant *tantum et tale* as it stands in his person.¹⁵³ The young of animals *in utero* at sequestration and not entered in the inventory may on attaining a separate existence be sold in virtue of the hypothec.¹⁵⁴ On the assumption that steelbow goods are the property not of the landlord but of the tenant,¹⁵⁵ they are liable to hypothec.¹⁵⁶

Crop. The hypothec extends over the inanimate produce—crop or fruits of every kind—whether natural or industrial.¹⁵⁷ Two modifications on this rule have been suggested, and with reason.

Green feeding. ‘In the neighbourhood of great towns grass farms are frequently cut in large patches and the grass carried daily to market. The nature of the subject so far deprives the landlord of the exercise of his hypothec, that he will not be entitled to insist on keeping the produce on the land. He must trust chiefly to cautioners for the security of his rent and to the effect of his right in competition for what may remain on the land. In a competition with creditors in bankruptcy or doing diligence individually, the hypothec would of course be effectual.’¹⁵⁸

Pasture. Again ‘it is true that in treating of hypothec our authors say generally that it affects all the fruits of the soil; but still it is plain that they mean to speak of those fruits only which are preserved and may thus be retained or recovered [crops white, black, and green, and cut grass or hay]; and not of grass which is in the course of daily consumption,’¹⁵⁹ and is turned into a different shape—and a far more profitable one for the landlord—on the increased value of the cattle.

5. In Horticultural Subjects.

Subjects of this sort—orchards and nursery and market gardens—are not struck at by the Amendment Act of 1867;¹⁶⁰ nor (it has been submitted) by the Abolition Act of 1880,¹⁶¹ so that if the right of hypothec prevails in regard to them, it must be governed by the rules of the common law. Of course, in so far as the plants, trees, hothouses, and the like, are the property of the landlord, the hypothec cannot subsist. But in so far as they are tenants’ fixtures, removeable by them in the course of their trade or at ish, there seems to be no reasonable ground for

¹⁵³ *M'Dowal v. Jamieson*, 1781, M. 6215. See *Kames' Eluc.* 75.

¹⁵⁴ *Lamb v. Grant*, 1874, 11 Sc.L.R. 672 (calf).

¹⁵⁵ *Supra*, p. 256.

¹⁵⁶ *Butter v. M'Vicar*, 1764, M. 6208; see *Crawford v. Stewart*, 1737, M. 6193, 10531, *Elch. Hypothec*, 7.

¹⁵⁷ St. 1.13.15; 4.25; Mack. 2.6.12; Bankt. 1.17.8; 2.9.21; *Kames' Eluc.* 75; Ersk. 2.6.57; 2 B.C. 29; B. Pr. 1235.

¹⁵⁸ 2 B.C. 29; see *infra*, as to gardens.

¹⁵⁹ *Per* Baron Hume in *Ross v. Williamson*, *supra*, ¹⁵⁰.

¹⁶⁰ *Supra*, p. 334.

¹⁶¹ *Supra*, p. 327.

doubt¹⁶² that the hypothec would obtain, whether the closer analogy be to agricultural or to business premises.

V. *Duration of Hypothec.*

Following the same order of exposition, it is settled that the right of hypothec over *invecta et illata* operates as security for each year's rent successively, and no further,¹⁶³ either for arrears,¹⁶⁴ or for payment of rent for a year during no part of which the effects were situated on the premises.¹⁶⁵ But the right expires as to each year's rent, if it is not made effectual by sequestration within three months after the last term of payment.¹⁶⁶ If that has been done, the preference is complete, though sale of the sequestrated goods does not take place till after the three months, provided there has not been undue delay or other evidence instructing abandonment.¹⁶⁷

Similarly, live-stock—not being as a whole the produce of any one year—are held to be hypothecated for the rent of each year successively,¹⁶⁸ and the period allowed by the law to the landlord for making his right effectual by sequestration is three months after the last conventional term of payment in each year.¹⁶⁹ The landlord loses his preference if he do not take proceedings before the lapse of that period;¹⁷⁰ there is no record of any relaxation of this strict rule;¹⁷¹ and it is adopted in the Amendment Act of 1867.¹⁷² This liability for the rent of the current year may be very inconvenient in practice where the conventional terms are postponed for an unusually long period; but there seems to be neither authority nor principle in favour of any exception being made in such cases.¹⁷³

¹⁶² See it raised in *Begbie v. Boyd*, 1837, 16 S. 232; and see *supra*, as to fixtures, p. 264.

¹⁶³ St. 1.13.15, 4.25; Mack. 2.6.12; Bankt. 1.17.10; Ersk. 2.6.64; 2 B.C. 33; B. Pr. 1240, 1277; *Hunter v. N. of England Banking Co.*, 1849, 12 D. 65 (forehand).

¹⁶⁴ *Dicks v. Lands*, 1630, M. 6243 (poiniding stopped).

¹⁶⁵ *Thomson v. Barclay*, 1883, 10 R. 694; *M'Intyre v. M'Nab's Trs.*, 1829, 8 S. 237, aff. 5 W. and S. 299; *Donald v. Leitch*, 1886, 13 R. 790.

¹⁶⁶ Authorities in ¹⁶³; *Christie v. Macpherson*, 14th Dec. 1814, F.C. 95 (in competition with landlord who had let for a new year to the sequestrator's subtenant).

¹⁶⁷ *M'Leod v. Thomson's Creds.*, 1805,

Hume 226.

¹⁶⁸ *Crawford v. Stewart*, 1737, M. 6193, 10531, Elch. Hypothec, 6.

¹⁶⁹ Bankt. 1.17.8; *Kames' Eluc.* 70; Ersk. 2.6.62; 2 B.C. 33; B. Pr. 1240; *More's Notes*, 81. The period was first fixed down in 1726, *Hepburn v. Richardson*, M. 6205.

¹⁷⁰ *Rorison v. Shaw*, 1766, M. 6211; *Ross v. Williamson*, 1817, *Hume* 232.

¹⁷¹ The suggestion of a reasonable extension of time in *Cathcart v. Mitchell*, 1775, M. 6212, is only in the rubric (delay of eight months). See 1 Bell, *Leases*, 380.

¹⁷² See next paragraph.

¹⁷³ Ersk. 2.6.62 throws out the suggestion. It is repudiated by *Hunter* (ii. 366) and cannot withstand the statute.

Crop.

Agricultural produce—crops of all kinds and the farmyard manure, of which they are ingredients—is hypothecated for the rent of the year of which it is the product, and of that year only,¹⁷⁴ whether the rent be payable at the legal terms, or backhand,¹⁷⁵ or forehand.¹⁷⁶ The crop of one year cannot be sequestrated for the rent of the preceding year, though it grew from seed which had itself been sequestrated for the last rent.¹⁷⁷ The old rule was that ‘the crop and corns growing ‘any year remain *ever* affected and subject to the master for ‘that year’s farm’s [rent], wherein he ought to be preferred to ‘all creditors or donatars.’¹⁷⁸ To tie up moveable property thus for an indefinite period was so serious a curtailment of freedom of commerce, that it may be regarded as astonishing that the law so remained till the Amendment Act of 1867.¹⁷⁹ That statute extends to all cases of hypothec for the rent of farms or lands the limitation in time which already obtained in regard to *invecta et illata* and stock. It enacts in effect that, if proceedings for making effectual by sequestration the right of hypothec are not commenced within three calendar months after the conventional (or failing such, the legal) term at which the year’s rent or the last portion due thereof is payable, the right of hypothec shall cease.¹⁸⁰

In horticultural subjects.

There is no authority in regard to the duration of hypothec in horticultural subjects. In some cases the crops are annual, or succeed each other at shorter intervals—as in the case of market-gardens—and there the analogy to farm crops is close. In other cases the crop requires several years to be fit for market, in that respect resembling live-stock. Probably these analogies would be followed as closely as the circumstances might admit.

Combined action of hypothec over stock, goods, and crop.

It follows from this description of the duration of the hypothec, that where there are *invecta et illata* or stocking to attach, there is a period of three months during which payment of two years’ rents may be assured (so far as the value of the effects goes)—the rents of the past year which are due, and the rents of the current year which are growing due. In most cases where

¹⁷⁴ Dirl. 222; St. 1.13.15; 4.25; Mack. 2.6.12; Bankt. 1.17.8; Kames’ Eluc. 70; Ersk. Prin. 2.6.26 (cf. Inst. 2.6.58, where the author falls into error); 2 Ross’ Lect. 404; 2 B.C. 33; B. Pr. 1239; Wardlaw v. Mitchell, 1611, M. 6187; Fairlie v. Johnstoun, 1636, 1 B.S. 359; Stewart v. Rose, 1816, Hume 229; Horn v. M’Lean, 1830, 8 S. 454.

¹⁷⁵ Crawford v. Stewart, *supra*, 168.

¹⁷⁶ Taylor v. Davidson, 1740, M. 6197.

¹⁷⁷ E. Cassilis v. Ramsay’s Creds., 1816, Hume 230.

¹⁷⁸ Hay v. Keith, 1623, M. 6188 (seven years).

¹⁷⁹ 30 & 31 Vict. c. 42, sect. 4.

¹⁸⁰ A saving of current leases is added

sequestration is required at all, and the lease is running on, it is prudent to combine the two—to sequester for payment and in security. If crop be also available, it only secures the rent of the year in which it was raised, but it thus leaves the other subjects *pro tanto* free to satisfy the claim for the other year. In the ordinary case the crop pays the rent of the earlier, the stocking secures the rent of the later year, as where the rent of crop 1885 is payable at the legal terms, Whitsunday and Martinmas 1885, and thus till 11th February 1886 the stocking secures the rent for 1886, and the crop and it together pay the rent of 1885. But postponement of payment of rent may bring about the opposite result. If the rent for crop 1885 is conventionally payable at Candlemas and Lammas 1886, till 1st November 1886 the stocking pays that rent, while the crop then extant secures the rent of 1886, payable at Candlemas and Lammas 1887.¹⁸¹

VI. *Rights to which Hypothec is postponed in Competition.*

The nature of the right is best observed when it is viewed as coming into competition with the rights of third parties. To certain rights the landlord's hypothec is postponed in competition; to others it is preferred, if, according to the rules set down above, it is timeously made effectual by sequestration. The simpler case is here taken up in the first place. The other falls within the next division of this chapter.

1. *Crown Debts.*

When procedure by arrestment, poinding, and imprisonment superseded the old writs of extent¹⁸² for the recovery of Crown debts, it was provided that nothing in the Court of Exchequer Act of 1856 (which put the matter on the new footing) should 'impair, injure, or affect any preference of the Crown in competition with other creditors; the execution of a charge, or, if the debtor was dead, of any arrestment or poinding being made equivalent to the *teste* of a writ of extent according to the old practice.'¹⁸³ By that practice, it was established,¹⁸⁴ that Crown process gave a preference over the landlord's hypothec, as and because it did so over the landlord's distress in England, ignoring the difference between a real right, like hypothec, and a right not real, like distress.¹⁸⁵ This preference subsists, so long as the

¹⁸¹ This case is figured in 2 Hunter, 367.

¹⁸² 19 & 20 Vict. c. 56, sects. 29-36—C. of Exchequer (Scotland) Act, 1856. As to the law of extents, see 2 B.C. 41 *seq.*

¹⁸³ *Ibid.*

¹⁸⁴ 2 B.C. 34, 54; B. Pr. 1241, 1247, 1277; More's Notes, 85; Ersk. 1.3.31, 2.6.64, notes; Brodie's Stair, 2.9.43.

¹⁸⁵ *Ogilvie v. Wingate*, 1791, M. 6884, rev. 3 Pat. 273, following as near an analogy as possible, as had been done by the House of Lords in adapting the Eng.

tenant's effects are not sold in pursuance of a sequestration, and is rendered operative by issue of Crown process before that time; ¹⁸⁶ if not indeed (as was held in one case), ¹⁸⁷ before the warrant had been granted ordering the sheriff-clerk to pay the landlord the amount due to him out of the price. ¹⁸⁸

Extended to
rates.

The landlord is excepted from the liability, to which other creditors are exposed, to pay the arrears for a year of income tax, inhabited house-duty, and land tax, due by their debtor in the event of their meddling with his goods by diligence. ¹⁸⁹ Although it would appear that this exception is now, by the repeal of earlier Acts which contained no such limitation, ¹⁹⁰ and their supersession by the Taxes Management Act, ¹⁹¹ imported into the Poor Law Act, which gives for collection of the poor-rate 'the whole powers and right of issuing summary warrants and proceedings, and all remedies and provisions enacted for collecting, levying, and recovering the land and assessed taxes, or either of them, and other public taxes;' ¹⁹² yet the preference contained in the close of the same section seems not to be thereby impaired, viz., that poor-rates 'shall in case of bankruptcy or insolvency be paid out of the first proceeds of the estate and shall be preferable to all other debts of a private nature due by the parties assessed.' ¹⁹³ The same preference is conferred by certain other statutes which contemplate the raising of rates. ¹⁹⁴

2. *Superior's Hypothec.*

A superior, it is now settled, has a hypothec for recovery of his feu-duties, not only over the produce and stocking of agricultural and pastoral subjects, but also over *invecta et illata* introduced into other premises. ¹⁹⁵ And where the subjects are let the

lish treason law to Scotland, in Gordon of Park's case, 1 Pat. 508, 558; Kames' Eluc. 381. The C. of Session reluctantly accepted the reversal, Leslie's Factor v. Tweedie, 1793, M. 7889. No question as to the priority of the Crown's right was attempted in Adam v. Sutherland, 1863, 2 M. 6.

¹⁸⁶ Robertson v. Jardine, 1802, M. 7891.

¹⁸⁷ The King v. Johnston, 1809, in 2 B.C. 56, note.

¹⁸⁸ This seems to be the view proceeded on in practice, Tait's J.P. 175, founded on reports of sheriff-clerks in Robertson, *supra*, ¹⁸⁹.

¹⁸⁹ 43 & 44 Vict. c. 19, sect. 88; see sect. 97 for procedure in Scotland.

¹⁹⁰ 43 Geo. III. c. 150, sect. 33; 52 Geo. III. c. 95, sect. 13.

¹⁹¹ 43 & 44 Vict. c. 19, *supra*, ¹⁸⁹.

¹⁹² 8 & 9 Vict. c. 83, sect. 88.

¹⁹³ Ibid., and School Rates, 35 & 36 Vict. c. 78, sect. 44.

¹⁹⁴ *e.g.*, County Police, 20 & 21 Vict. c. 72, sect. 32, and Acts incorporating its procedure; County General Assessment, 31 & 32 Vict. c. 82, sect. 7; Poor Rates, Adamson v. Ambrose, 1858, Guthrie's Dec. 315. See Rankine, Landownership, 663 *seqq.*

¹⁹⁵ Cr. 2.9.11; St. 2.4.7; Mack. 2.6.12; Ersk. 2.6.63; 2 B.C. 27; B. Pr. 698; Yuille v. Lawrie, 1823, 2 S. 155 (N.E. 140); V. Stormont v. Andersons, 1675, M. 10514.

superior's right prevails, since the landlord cannot let his land otherwise than under burden of the feu-duties.¹⁹⁶ The preference—still known as a hypothec though different in many respects from landlord's hypothec—is worked out in the following way. The superior cannot sue his vassal's tenants in an action of mails and duties for he has no right to enter into possession.¹⁹⁷ His remedies against them are the real action (or diligence) of poinding of the ground; and a personal claim against them as intromitters with the fruits, limited to the recovery of such feu-duties only as have accrued during the intromitter's possession,¹⁹⁸ preferable to the landlord's claim for rent and elided by *bond fide* payment of the rent to the landlord.

3. Servants' Wages.

It is settled that a *farm* servant has a claim for his current (*i.e.*, a year's or a half-year's)¹⁹⁹ wages, which is preferable to the landlord's hypothec.²⁰⁰ A judgment to the contrary effect had been given prior to the case which finally established this proposition; but the point did not properly arise for decision;²⁰¹ and opinions in favour of the law as now settled were delivered in a case which was decided on specialties.²⁰² The reasons adduced in the first-cited case were that the crop was created by the labour of the servants directly, and not merely indirectly like the labour of the plough-wright; that otherwise the landlord would be better off than if the lands were in his own possession; that in the old law they were really the landlord's own servants; and that the hypothec could not deprive them of their food from the fruits of the farm. The dangerously wide ground that their labour was *in rem versum* of the landlord was also adduced.²⁰³ There seems to be no reason for confining their preference to the proceeds of the crops,²⁰⁴ and excluding the proceeds of the

¹⁹⁶ Ersk. : B. Pr. : B.C., *supra*, ¹⁹⁵.

¹⁹⁷ Prudential Ins. Co. v. Cheyne, 1884, 11 R. 871.

¹⁹⁸ *Ibid.*, esp. p. 880, *per* L. Rutherford Clark; *Rollo v. Murray*, 1629, M. 4185; *Cockburn v. Trotters*, 1639, M. 4187; *Winerham v. Ly. Idington*, 1665, M. 4188; *Hamilton v. L. Burleigh*, 1712, M. 4189; *Biggar v. Scott*, 1738, M. 4191, Elch. Feu-duty, 2, and Superior and Vassal, 4; and see *Kincardin's Creds. v. Tacksmen*, 1699, 5 B.S. 3.

¹⁹⁹ In *White v. Christie*, *infra*, ²⁰¹, half-year; in *M'Glashan*, ²⁰⁰, a whole year.

²⁰⁰ *M'Glashan v. D. Athole*, 29th June 1819, F.C. 765, ops. reported in 1 Bell,

Leases, 414; 2 B.C. 35, 158; B. Pr. 1241, 1404; *More's Notes*, 85; notes to Ersk. 2.6.58, 3.9.43; *Brodie's Stair*, 2.9.43. Their privilege over arresters on the produce was established earlier—*Melville v. Barclay*, 1779, M. 11853; A.S., 23rd Jan. 1779; and this applied to harvesters as well as regular farm-servants—*Lockhart v. Paterson*, 1804, M. Privileged Debt, 2.

²⁰¹ *White v. Christie*, 1781, M. 11853; 1 Bell, *Leases*, 412.

²⁰² *Crosbie v. Bell*, 1818, 1 Bell, *Leases*, 415.

²⁰³ 1 Bell, *Leases*, 415 *seq.*

²⁰⁴ *Per* L.P. Hope, 1 Bell, *Leases*, 417.

stocking, to the rearing of which their services are equally essential.

Other servants.

The reasonable view has been taken in a book of authority,²⁰⁵ and in certain Sheriff Courts,²⁰⁶ that the rule extends to domestic servants, and, through them, to clerks, shopmen, other servants, and workmen—domestic servants for their current wage; clerks, shopmen, and these other servants for four months' wages (up to £50) prior to the sequestration or, failing that, prior to the course of diligence for distribution of the estate of the tenant being notour bankrupt; and workmen for two months' wages.²⁰⁷ This view is based on 'humanity or charity or expediency or [servants'] 'hypothec;' on the generality of the postponement of other claims to debts technically known as privileged;²⁰⁸ on the use of the term 'hypothec' with regard to such debts; and on the example of France²⁰⁹ and England.²¹⁰ The only ground of doubt is the special nature of part of the above argument in favour of farm servants.

4. *Death-Bed and Funeral Expenses of Tenant.*

Death-bed and funeral expenses, long recognised as preferable to ordinary debts,²¹¹ are now also recognised as preferable to the landlord's hypothec.²¹² The claim is only allowed in so far as it is fair and reasonable; it is not barred by the circumstance that sequestration was instituted prior to the tenant's death; it may be made effectual though an order be pronounced (and without recall thereof) to pay the proceeds of the sale of the sequestrated effects to the landlord or even by reclaiming the money from him; and, if for death-bed expenses, it is not restricted to such as have been contracted within sixty days of the death.²¹³

VI. *Mode of making the Hypothec effectual.*

A. *Retention of the Subjects attached.*

In order to prevent dilapidation of his security, the landlord is entitled to prevent the tenant and any third party from dis-

²⁰⁵ Fraser, Master and Servant, 149; see 2 Hunter, 384.

²⁰⁶ Boag v. M'Laine, 1880, 24 J. of Jurisp. 163; Dobbie v. Thomson, 1880, 7 R. 983.

²⁰⁷ 38 & 39 Vict. c. 26, sect. 3. This is not affected by the saving of hypothec in the Bankrupt Act, 19 & 20 Vict. c. 79, sect. 119.

²⁰⁸ Authorities in Fraser, p. 149.

²⁰⁹ Pothier, Louage, 256.

²¹⁰ 46 & 47 Vict. c. 52, sect. 40 (the analogy halts).

²¹¹ Peter v. Monro, 1749, M. 11852 (d.-bed) Lawson v. Maxwell, 1784, M. 4473 (*do.*, excluded by *lex loci contractus* being in England). Ly. Dunipace v. Watson, 1750, M. 11452 (funeral expenses), and other cases in B. Pr. 1403; St. 3.8.72; Bankt. 1.2.55; Ersk. 3.9.43; 2 B.C. 156; Elch. Fun. Charges, 2.

²¹² Rowan v. Bar, 1742, M. 11852; Drysdale v. Kennedy, 1835, 14 S. 159 (doctor's bill); B. Pr. 1241, 1277, 1403.

²¹³ Drysdale, *supra*, ²¹², esp. L. Moncreiff's opinion.

plenishing the premises.²¹⁴ This is known as his right of retention or detention. There is an obvious distinction between cases in which the rent sought to be secured is only growing due, the term of payment not having come, and cases in which the rent is due and payable.

1. *Retention previous to Term of Payment.*

The rule is that the landlord is entitled in this case to retain on the premises the whole crop and stocking or *invecta et illata* (as the case may be), until he obtains security for payment.²¹⁵ This he accomplishes by obtaining interdict against the tenant and all others acting for him or under his instructions from interfering with or removing the subjects of the hypothec or any part thereof till caution be found; or by stopping a pouding by creditors.²¹⁶ It is no answer that a sufficiency of goods has been left on the ground to answer the hypothec.²¹⁷ The landlord should state his title to stop the pouding, so as to give the tenant an opportunity of finding caution at once.²¹⁸ The landlord may proceed for either of these objects, whether the tenant is *vergens ad inopiam*, or in arrear of rent, or on the contrary, perfectly solvent and owing nothing to him—the right of retention being absolute and not founded on imminent peril of loss.²¹⁹ If ample security be offered or found, the application for interdict, besides making it clear what particular acts are to be forbidden, must, in order to be relevant, bring the case up to displenishment inconsistent with good management. Thus, where the alleged purpose of a tenant was to turn a dairy-farm into a pastoral farm, an application was held to be too vague which sought to have him interdicted from displenishing the farm and from selling the whole stock and implements; or otherwise from selling such stock and implements as might be requisite and necessary for the proper management of the farm.²²⁰

An offer of caution or consignment is a relevant answer, and the removal or pouding may then proceed.²²¹ The landlord is

²¹⁴ Dirl. 222; St. 1.13.15; 4.25.2; Mack. 2.6.12; Bankt. 1.17.8.12; Ersk. 2.6.58; 2 B.C. 32; B. Pr. 1239.

²¹⁵ Donald v. Leitch, 1886, 13 R. 790; Small v. Boyds, 1877, Guthrie's Dec. 307.

²¹⁶ Hay v. Keith, 1623, M. 6188.

²¹⁷ Swinton v. Seton, 1627, M. 6218; Hay v. Elliot, 1639, M. 6219; Pringle v. Scott, 1736, M. 6126, Elch. Hypothec, 5; Crawford v. Stewart, 1737, M. 10531,

6193, 6216, Elch. ibid. 6, overruling Sharp v. Maxwell, 1731, M. 6216.

²¹⁸ Halkerton v. Kadie, 1628, M. 3426.

²¹⁹ Preston v. Gregor, 1845, 7 D. 942.

²²⁰ Cathcart v. Sloss, 1864, 3 M. 76, 521.

²²¹ Crawford v. Stewart, *supra*, ²¹⁷; see a doubtful modification where rent payable in victual, the *very* corn reaped, Hall v. Nisbet, 1748, M. 6228.

bound on receiving payment from the cautioner to assign to him his right to the rent and hypothec.²²² It seems doubtful whether the doctrine—stated as general but reached in a case into which clandestine removal entered—that the privilege of removal on caution or consignation is only bestowed on creditors, not on the tenant himself, can be justified since *tutius est rei incumbere quam personæ*.²²³ The caution guarantees payment of the current rent, interest, and penalties.²²⁴

2. Retention after Term of Payment.

For year's rent
and seed.

This right attaches only such plenishing as in value is equivalent to the full year's rent (and seed, if the premises be agricultural). Therefore a poinding creditor must satisfy the Court that he has left as much;²²⁵ otherwise he renders himself liable for the rent as an intromitter.²²⁶ It is no excuse that he proceeded in his diligence according to the forms of law and had *in bonâ fide* consumed the fruits.²²⁷ An early decision in which it was held that crops are first and principally hypothecated, and that it was no defence to allege that sufficient cattle were upon the farm to pay the rent, is probably explicable on the supposition that the landlord's security over the cattle not for past due but current rent would have been unduly impaired if the whole burden had been thrown on the stock.²²⁸

To be paid, not
secured.

In contrast to the case of rent growing due, rent due and payable must, if sufficient hypothecated subjects be not left, be paid,²²⁹ and not merely caution found; and the proper voucher is a discharge, not an assignation, the landlord not being bound to assign his right to the hypothec.²³⁰

B. Recovery of Hypothecated Subjects when Removed.

It is a corollary to this right of retention,²³¹ that when the hypothecated subjects have, in spite of the landlord's right, been

²²² Crawford, *supra*, ²¹⁷; Butter v. Riddel, 1792, Bell, Oct. Ca. 154 (arrested stock).

²²³ L. Salton v. Club, 1701, M. 1821, 6216. See Cathcart, *supra*, ²²⁰, where the offer was made by the tenant and is founded on by the L.O.

²²⁴ Appropriate conclusions for interdict against removing plenishing are to be found in Lees, Styles, 194.

²²⁵ Hay v. Keith, 1623, M. 6188; Philips v. Easson, 1807, Hume 228; Lamington v. Oswald, 1688, M. 6224; Rutherford v. Scot, 1736, M. 6226.

²²⁶ L. Polwarth, 1642, M. 6221.

²²⁷ Ruthven v. Arbuthnot, 1673, M.

6222; see a device defeated in Selkraig v. French, 1708, M. 6224.

²²⁸ Dun v. Dun, 1628, M. 6217.

²²⁹ Crawford v. Stewart, *supra*, ²¹⁷.

²³⁰ A. v. B., or Tod v. Montgomery, 1743, M. 6228, Elch. Hyp. 11; Graham v. Gordon, 1841, 3 D. 479, rev. 2 Robins. 251, 4 D. 903 (not a cautioner); M'Arthur v. Forbes & Co., 1822, 2 S. 91 (N.E. 74) seems *contra*, but only passed the note to try the question.

²³¹ It cannot have a wider scope than the right of retention; cf. Ersk. 2.6.58.60, which maintains the contrary, with Ivory's Notes, and E. Cassilis v. Ramsay's Creds., 1816, Hume 230.

carried away, he has a right of recovery. At one time, recovery, if *de recenti*, might be made by the landlord at his own hand without judicial authority;²³² but the danger of a breach of the peace and the readiness with which judicial assistance can be called into play, would now make it prudent, if not imperative, to apply to the Judge Ordinary. At any rate, if the seizure took place after the property had passed by means of a poinding,²³³ or *ex intervallo*, the landlord would expose himself to a counter-claim for damages of the nature of the ancient spuilzie.²³⁴ In either case he would have a claim for the rent against any one wrongously intromitting with the hypothecated subjects.²³⁵

The landlord has the further safeguard that where there is a *Fraudulent* case of fraudulent bankruptcy involving the clandestine removal of *bankruptcy* sequestrated effects, the aid of the criminal law may be called in. If statute be resorted to by the prosecutor, the tenant himself alone can be charged.²³⁶ If the common law be relied on, he and his accomplices may all be accused.²³⁷

C. *Hypothec in Competition.*

The mode in which the preference thus conferred on and practically insured to the landlord, operates in competition with other rights may now be indicated, before passing on to the process of sequestration, which converts a real security over the tenant's effects generally into a real security over specific subjects. The competing rights to be noticed are those which reside in: (1) personal creditors of the tenant doing diligence; (2) purchasers; and (3) intermediate lessees.

(1) *Tenant's Creditors in Competition.*

The landlord is preferred to all unprivileged²³⁸ poinding and *Creditors doing* arresting creditors of the tenant. This rule prevails apart *diligence* altogether from the particularising of the security brought about by sequestration.²³⁹ The creditors are of course free to do dili-

²³² *Crichton v. E. Queensberry*, 1672, M. 6203 (within twenty-four hours); *Ersk.* 2.6.58. In *Donald v. Leitch*, 1886, 13 R. 790, the furniture had only reached a lorry at the door and the landlord got the aid of a sheriff-officer.

²³³ *Currie v. Crawford*, 1745, M. 6206.

²³⁴ See *Park v. Cockburn*, 1676, M. 6203.

²³⁵ *Ibid.* See appropriate conclusions in *Lees, Styles*, 175. See the consequences of contumacy in an old case—*Jackson v. Lind*, 1745, M. 6245.

²³⁶ Debtors Act, 43 & 44 Vict. c. 34, sect. 13, A. 3 and 5; *Robertsons v. Caird*, 1885, 13 R. Just. 1.

²³⁷ *M'Alister v. Orr*, 1822, 1 S. 339 (N.E. 317); *M'Donell v. Cameron*, 1824, 3 S. 131 (N.E. 88), which were complaints to the Court of Session. Two unreported judiciary cases are mentioned in *Macdonald, Crim. Law*, 4.

²³⁸ *Supra*, p. 339.

²³⁹ *M'Dowal v. Jamieson*, 1781, M. 6215.

gence against subjects not affected by the hypothec;²⁴⁰ or so far as it is attempted to enforce the landlord's preference beyond its legal scope.²⁴¹ Therefore as arrears of rent are not secured by hypothec, diligences by the landlord and by a creditor of his tenant are preferred according to the ordinary rules of priority;²⁴² and it is immaterial in such a question whether the subjects of the diligence have to be given over to the landlord at outgoing or not, since this obligation is of a personal nature only, importing no real right in favour of the landlord.²⁴³ Other illustrations of the landlord's preference in virtue of his hypothec have been cited in the foregoing paragraphs.

(2) *Purchasers.*

Purchasers of hypothecated goods being intrromitters, the landlord's right prevails against theirs;²⁴⁴ and they have either to restore what they have removed²⁴⁵ or pay the value in name of rent.²⁴⁶ Under the old law, though doubtless by the aid of 'some specialty' the landlord's claim for rent was not barred by a delay in one case of nineteen years.²⁴⁷ The validity of the purchase depends on the rules already explained—on the rent being due or only current; and the consequent admissibility or irrelevancy of a plea that sufficient goods remain unsold.²⁴⁸ A purchase, which might otherwise be good against the landlord's hypothec, is ineffectual if not followed by delivery.²⁴⁹ Therefore, where spirits kept in a bonded warehouse let along with a distillery were sold by the distiller, the hypothec was not affected, since nothing had followed on the sale except an order for delivery to the purchaser granted to him and by him intimated to the warehouseman.²⁵⁰

Rule modified. This strict rule is so prejudicial to commerce, that it has received modifications in two directions.

(a) *Sale by Bulk in Open Market.*

If the hypothecated effects are sold by bulk in open market the purchaser is safe. This exception was not at first re-

²⁴⁰ *Gibson v. May*, 1841, 3 D. 974.

²⁴¹ *Deas v. Walker*, 1830, 8 S. 670; *Campbell v. Brown*, 1831, 9 S. 258.

²⁴² *Tulloch v. Willoughby D'Eresby*, 1834, 12 S. 754, 14 S. 198; *Young v. Welsh*, 1833, 12 S. 233.

²⁴³ *Stewart v. Rose*, 1816, Hume 229; followed in *M'Gregor v. Hunter*, 1850, 13 D. 90.

²⁴⁴ *Swinton v. Seton*: *Hay v. Elliot*, *supra*, 217.

²⁴⁵ *Scott*, 1678, M. 6223.

²⁴⁶ *St. Andrew's Commissary v. Watson*, 1677, *ibid.*; *M'Ghie v. Mather*, 1824, 3 S. 337 (N.E. 239); and see 3 S. 339.

²⁴⁷ *Lamington v. Oswald*, 1688, M. 6224.

²⁴⁸ *Ibid.*; *Rutherford v. Scott*, 1736, M. 6226 (rent due).

²⁴⁹ *Kinneil v. Menzies*, 1790, M. 4973. Would delivery of the key of premises let be enough?—B. Pr. 1277.

²⁵⁰ *Wyld & Co. v. Richardson*, 1832, 10 S. 538.

cognised,²⁵¹ though clearly politic and elsewhere adopted.²⁵² It established itself more by professional *dicta* and practice²⁵³ than by judicial decision.²⁵⁴ It was not extended to purchase in open market by sample. In one such case the landlord's preference was enforced in an action which was raised nineteen months after the sale and fifteen months after the rent became due, and in spite of the fact that most of the commodity purchased (it was grain) had been delivered and paid for.²⁵⁵ In another case of sale by sample the grain was all delivered and the price paid, but there was no unusual delay in asserting the landlord's right; and the strict rule of law was maintained amid a general chorus of regret at the result.²⁵⁶ Public roup would, probably, be regarded, for the purposes of this part of the law, as open market. If hypothecated effects be sold in this way or in any of these ways, and before delivery the purchaser receives warning from the landlord of his right of hypothec, he ought not to take delivery; and, if delivery takes place, the landlord is entitled to have the effects brought back.²⁵⁷

(b) *Agricultural Produce protected by Statute.*

The inconveniences caused to farmers and dealers by the decisions just cited, and especially by a startling judgment, which in entire conformity with law and practice established that oats do not cease to be liable to hypothec by being converted into meal, and that the purchase of meal by a meal-dealer in his own premises was not purchase in open market,²⁵⁸ led to the appointment of a Royal Commission and eventually to the passing of the Hypothec Amendment Act, 1867,²⁵⁹ some of the provisions of which have been already cited. It will be remembered that this statute applies only (with a single exception) to lands held for grazing or agricultural purposes. The third section enacts (in effect) that—(1) when agricultural produce has been *bonâ fide* purchased for its fair marketable value from a tenant of any farm or lands, and removed therefrom and paid for; and (2) when

²⁵¹ *Hay v. Elliot, supra*, 217; *Molison v. Smith*, 1687, M. 6239.

²⁵² *Pothier, Louage*, § 265; *Code Civil*, 2102; *L. Brougham* in 4 W. and S. 428; *Woodfall*, p. 435.

²⁵³ *Dirl*, 222; *St.* 1.13.15, 4.25.2.6; *Ersk.* 2.6.60; 2 B.C. 34; *B. Pr.* 1242; *More's Notes*, 82; *Brown on Sale*, 421. *Mack*, (2.6.12) is *contra*.

²⁵⁴ See *Cunnison v. Stewart*, 1723, M. 6225; assumed in *E. Dalhousie v. Dunlop & Co.*, *infra*, ²⁵⁶.

²⁵⁵ *Smart v. Ogilvie*, 1796, 3 Pat. 490 6 Br. Parl. Ca. 498 (rubric).

²⁵⁶ *E. Dalhousie v. Dunlop & Co.*, 1828, 6 S. 626, *aff.* 4 W. and S. 420; 2 B.C. 698.

²⁵⁷ *Cooper v. Bone*, 1823, 2 S. 598 (N.E. 511).

²⁵⁸ *Barns v. Allan & Co.*, 1864, 2 M. 1119 (dealer had to pay price over again).

²⁵⁹ 30 & 31 Vict. c. 42. *Infra*, Appx. No. iii.

such produce has been *bond fide* purchased at public auction from a tenant or any person holding his authority so to sell, after seven days' written notice of the intention to sell given to the landlord or person entitled to the rent, or his or their factor or known agent, without sequestration being obtained and registered before the lapse of the notice; the hypothec ceases. The Act does not apply either to produce which the tenant is not entitled to sell or remove; or to produce which has been affected by a registered sequestration before its removal and the payment of its price, or after ²⁶⁰ said notice.

Mercantile
Law Amend-
ment Act,
1856.

The landlord's hypothec is expressly saved in the Mercantile Law Amendment Act, 1856,²⁶¹ which provides (sect. 1) that goods sold but not delivered are not to be attachable by the seller's creditors to the effect of preventing the purchaser from enforcing delivery; that (sect. 2) a purchaser from a purchaser not in possession shall be entitled to demand delivery direct on payment and implement, without being exposed to a counter-claim due to the seller by the intermediate purchaser; and that (sect. 3) a seller may attach goods in his own hands by arrestment or pouncing prior to intimation of such sale (as above) to a subsequent purchaser, to the same effect as if the diligence were done by a third party (sect. 4). By the Bankruptcy Act, 1856²⁶² hypothec is also saved. So that landlord's sequestration may go on alongside of sequestration in bankruptcy, the landlord's right to be paid or secured prevailing over that of the trustee. The Personal Diligence Act of 1838²⁶³ also leaves hypothec as it found it.

Bankruptcy
Act, 1856.

Personal
Diligence Act,
1838.

(3) *Intermediate Lessees. Effect of Sublease.*

Where there is a sublease two rights of hypothec may consist: the right of the landlord, and the right of the lessee.

(a) *Hypothec as between Landlord and Sublessee.*

Sublease not
sanctioned.

The leading rule is that where there has been no consent to or recognition of the sublease by the landlord, either imported into the original contract by law (as in leases of houses), or by express stipulation in the principal contract, or by *ex post facto* concurrence or acknowledgment, the landlord's right is unim-

²⁶⁰ This seems to be an inaccurate way of saying 'before or during the currency of;' or perhaps the words 'and before sale by public auction' have been dropped out.

²⁶¹ 19 & 20 Vict. c. 60, sect. 4.

²⁶² 19 & 20 Vict. c. 79, sect. 119. It is not wonderful, therefore, that the land-

lord is preferred to the donatary of his tenant's escheat—St. 1.13.15, 4.25; Ersk. 2.6.60; Hay v. Keith, 1623, M. 6188; Cumming v. Lumsden, 1667, M. 6237 (against argument on higher right of Crown).

²⁶³ 1 & 2 Vict. c. 114, sect. 31.

paired by anything his lessee may have done in the way of subletting. He is entitled to attach such effects, patient of hypothec, as he may find on the subjects let, in security or for payment of the rent due to him by his own tenant.²⁶⁴ The leading example of a lease, subject to the *delectus personæ*, and unassignable, is a tack of agricultural land;²⁶⁵ and it supplies illustrations of this rule. The landlord is preferred to a purchaser from a subtenant of agricultural produce, since the fruits remain hypothecated to him, whoever may intromit with them, and he is not bound in the first place to discuss his own tenant;²⁶⁶ to an arrester of funds due by the subtenant to the tenant;²⁶⁷ and to the tenant himself;²⁶⁸ unless the remedy be lost by delay,²⁶⁹ or otherwise. It may be taken as settled both on principle²⁷⁰ and by authority;²⁷¹ though some doubt,²⁷² and even a contrary view,²⁷³ have been expressed, that a sublessee of part only of the subject let in the principal lease has his effects hypothecated for the whole of the principal tenant's rent. The sublessee is not protected by having paid all the subrents due to the tenant. Attention has been already called to a modification of this rule in the case of graziers,²⁷⁴ who may be regarded as in a manner sublessees. On payment to the landlord after payment already made to the tenant, sublessees (including graziers) have no right to demand an assignation to the hypothec, unless they can demonstrate that the landlord's rights would not be thereby prejudiced.²⁷⁵ It seems the better opinion that such a demand can be enforced in no case except where there has been a promise to assign.²⁷⁶

Liability not limited to subrents due.

Where in any of the ways above mentioned, the tenant has power to sublet (as for example in leases of urban subjects), the landlord's hypothec extends only to secure payment to him (instead of the tenant) of the subrents which are resting-owing; or which (it is submitted) have been paid before the stipulated term of payment. The sublessees (except in the latter case)

Sublease sanctioned.

²⁶⁴ Bankt. 1.17.9, 2.9.17; Ersk. 2.9.63; 2 B.C. 31; B. Pr. 1237; More's Notes, 83.

²⁶⁵ *Supra*, p. 158.

²⁶⁶ *Fowler v. Cant*, 1630, M. 6219.

²⁶⁷ *Cs. Traquair v. Cranstoun*, 1667, M. 6221.

²⁶⁸ *L. Salton v. Club*, 1700, M. 1821, 6224.

²⁶⁹ *Ross v. Williamson*, 1817, Hume 232.

²⁷⁰ *E.g.*, the cognate case of subfeus,

where there has been no allocation of the over feu-duty agreed to by the over-superior.

²⁷¹ *L. Salton v. Club*, *supra*, ²⁶⁸; Ersk. 2.9.63, and Ivory's Note.

²⁷² 2 B.C. 31.

²⁷³ 1 Bell, Leases, 396.

²⁷⁴ 30 & 31 Vict. c. 42, sect. 5, *supra*, p. 335.

²⁷⁵ *Steuart v. Stables*, 1878, 5 R. 1024.

²⁷⁶ *Supra*, p. 335.

cannot be compelled to pay a second time.²⁷⁷ But the right to full recourse may be reserved, as by a stipulation that the subtenant is to be liable for the principal rent.²⁷⁸

(b) *As between Lessee and Sublessee.*

A lessee has a right of hypothec over his subtenant's effects for payment or in security of the subrents, if he have power to sublet. An assignation of all the landlord's remedies is said to be implied in that power.²⁷⁹ A case of competition is a strong illustration of this doctrine. A lessee was held entitled to enforce his hypothec *super invecta et illata* within three months after the end of the subtenant's lease in preference to the landlord's claim against the *quondam* subtenant who had then become principal tenant, for his first term's rent due in this new capacity.²⁸⁰

(c) *As between Lessor and Lessee.*

In the case just cited the tenant had paid all the principal rent due by him, and had ceased to be tenant, so that the landlord had no counter-claim or interest to interfere. But, if that be not so, the tenant's sequestration of his subtenant's effects will not be allowed to go on unless the tenant finds security for the rent due by him to the landlord, not only up to the value of the effects but for the whole.²⁸¹ 'The principal tenant is primarily liable to the landlord, not a mere cautioner for rent. If the landlord have proceeded to sequester the effects of the subtenant, he may abandon that proceeding without discharging the principal, who has it in his power to sequester, or on paying the rent to take up the landlord's sequestration. But if the landlord should not only abandon his diligence, but give time to the subtenant, the principal tenant will be freed.'²⁸²

D. *Plenishing Order.*

Apart from the ordinary obligations to repair and maintain in repair, to conform to the rules of good husbandry, to refrain from diversion of the use of premises let, there is in cases where the right of hypothec still subsists an obligation to

²⁷⁷ *Blane v. Morison*, 1785, M. 6232 (special authority; the long usage does not seem necessary to the decision); Bankt. 2.9.17; 2 B.C. 31; B. Pr. 1237. The rule is different in subfeus, and in spite of these *dicta*, there may be room to doubt whether the rule in *Blane* can be carried further than to cases of express authority.

²⁷⁸ B.C. *supra*, ²⁷⁷.

²⁷⁹ 2 B.C. 31; *Ivory's Note to Ersk. supra*, ²⁷¹; see *Scott v. Anderson*, 1865, Guthrie's Dec. 305 (a case of *bonus* on assignation).

²⁸⁰ *Christie v. Macpherson*, 14th Dec. 1814, F.C. 95.

²⁸¹ *Stevenson v. Cooper*, 1822, 1 S. 312, (N.E. 288).

²⁸² B. Pr. 1237; *Williamson v. Forbes*, 1830, 8 S. 405.

stock, furnish, or—to use the widest term—plenish the premises to such an extent at least as will make the full right of hypothec practically available.²⁸³ Thus, in the case of a pastoral farm, there must be sufficient stock to satisfy the Stock. hypothec; and it will be no answer to a demand for plenishing to allege that there is enough stock on the farm, if cattle, sheep, or other bestial belonging to others and brought in to graze be taken into computation; the reason being that the landlord's security is materially weakened by this otherwise legitimate mode of occupation.²⁸⁴ So also in the case of urban subjects, the tenant of a house is bound to furnish it to an extent adequate to Furnishings. the same end.²⁸⁵ Similarly, the tenant of a shop is bound to furnish it, so as not to deprive the landlord of the security he is entitled to have at common law for his rent, and to keep it dry, but not to open it and carry on business in it, unless, as commonly happens, there be a special stipulation to that effect.²⁸⁶ The plenishing order is granted by the sheriff on petition, which in the case of urban subjects usually contains as sanction a prayer for caution,²⁸⁷ or, failing that, for summary ejection, in the event of failure to plenish at the sight of an auctioneer or valuator; and thereafter for power to relet and to remove the ejected tenant's effects to neutral custody.²⁸⁸ The time allowed for implementing the order varies according to circumstances and the discretion of the Judge.²⁸⁹ The effect of an ejectment is, not to bring the lease to an end, but merely to call into play the remedy of reletting in aid of the recovery of bygone rents. If the defaulter at any time during the currency of the lease, when reinstatement was consistent with new arrangements, offered to pay up arrears and plenish he would apparently be entitled to demand restoration.²⁹⁰ It seems to follow that the landlord would not be entitled to make such arrangements in reletting as unreasonably to exclude *locus pœnitentiæ*. Such an order of ejection is

²⁸³ B. Pr. 1273.

²⁸⁴ *M'Kye v. Nabony*, 1780, M. 6214; *M'Dougall v. Buchanan*, 1867, 6 M. 120.

²⁸⁵ B. Pr. 1273; *Thomson v. Handy-side*, 1833, 12 S. 557 (factor). See *Adam v. M'Dougall*, 1828, 6 S. 978.

²⁸⁶ *Whitelaw v. Fulton*, 1871, 10 M. 27.

²⁸⁷ Only for rent to which hypothec applies, not arrears or hire of moveables—*Wright, infra*, ²⁹⁰.

²⁸⁸ See appropriate conclusions in *Lees, Styles*, 255, 451, 456 (there may be order

to air the premises and keep off damp, *ibid.*); *Whitelaw, supra*, ²⁸⁶; *Cunningham v. Black*, 1883, 10 R. 441, where a defence of abandonment acquiesced in was held relevant, but was not made out on the facts. *Wright: Robertson, infra*, ²⁹⁰, ²⁹¹.

²⁸⁹ In *Thomson, supra*, ²⁸⁵, 24 hours was said to be the ordinary time in Edinburgh; *Wright* (10 days).

²⁹⁰ *Wright v. Wightman*, 1875, 3 R. 68.

competent to the sheriff, since it does not involve a rescission of the contract.²⁹¹

E. *Sequestration and Sale.*

(1) *Sequestration.*

Attaching
specific effects.

The mode in which the landlord's real right of hypothec—a general attachment entitling him to retain and recover—is converted into a real right over specific subjects is by the process of sequestration—known as landlord's sequestration, to distinguish it from the wider bankruptcy process. If this remedy be insufficient it is followed by sale, out of the proceeds of which the landlord receives what is due to him or a part thereof. Since these remedies are devised simply for the purpose of rendering the right of hypothec effectual, they are only competent to holders of that right.²⁹²

Limit in time.

The period within which proceedings may be commenced for the recovery of the rent of a particular term or year is that which has already been mentioned in treating of the duration of the hypothec.²⁹³ It will be remembered, that hypothec covers in certain cases not only rents past due, but also current rents. Consequently sequestration may then take place not only for payment of rents past due but also *currente termino* in security of rents growing due. The two conclusions are usually combined. If not, it would probably (even now that amendments are more easily admitted than formerly) be incompetent to convert the one into the other, there being an essential distinction between the two, involving different defences.²⁹⁴ A distinction is, however, made in regard to the date of sale. Crop and stock are subject to frequent fluctuations of price, and there is more or less risk of loss in the keeping of them; while *invecta et illata* of all kinds do not vary much in price and are not expensive or troublesome to keep. The consequence is that while all sorts of hypothecated articles may *currente termino* be sequestrated,²⁹⁵ *invecta et illata* may not,²⁹⁶ while crop and stock may, be sold before the term of payment.²⁹⁷ In the latter case, the part of the proceeds effeiring to the current rent remains in Court subject to the orders of the sheriff;²⁹⁸ and the landlord must face the consequences of

²⁹¹ *Ibid.*; *M'Dougall v. Buchanan*, *supra*,²⁸⁴; see *Robertson v. Cockburn*, 1875, 3 R. 21. A declarator of irritancy must be within the Sheriff Court limit of £1000 value or £50 a year—40 & 41 Vict. c. 50, sect. 8. Is imprisonment also competent, the obligation being *ad factum præstandum*? See *M'Dougall*, *supra*,²⁸⁴.

²⁹² *Supra*, p. 323.

²⁹³ *Supra*, p. 337.

²⁹⁴ See *Miller v. Paterson*, 1837, 9 S. 792, *per* L. Corehouse.

²⁹⁵ *Bankt.* 1.17.11; 2 B.C. 33; *Ersk.* 2.6.61.

²⁹⁶ *Wells v. Proudfoot*, 1800, *Hume* 225; *Duffy v. Gray*, 1858, 20 D. 580.

²⁹⁷ *Grant v. Sherrie*, 1784, M. 6201; *Dow v. Hay*, 1784, M. 6202; see *Dods v. Fortune*, 1854, 16 D. 478.

²⁹⁸ *Ibid.*

unwarrantable process, if he have been hasty in taking his remedy.²⁹⁹

The procedure may be best studied in treatises on Sheriff Petition. Court practice.³⁰⁰ The petition prays the Court to sequester and grant warrant to officers of Court to inventory and secure the whole effects [as the case may be] so far as subject to the pursuer's hypothec in security and for payment (1) of rent due, (2) of current rent, with interest from the term of payment and expenses; and thereafter to grant warrant to sell by public roup the whole or so much of the sequestered subjects as will pay the said rents, interest, and expenses;³⁰¹ and to appoint payment out of the proceeds or any consigned sum to the landlord.³⁰² Every petition may now 'contain a prayer for a decree for payment of ' the rent with reference to which the petition is presented,' and the sheriff may pronounce such decree for the rent or any part thereof extractable in common form.³⁰³ If hypothecated subjects have been removed before the date of the petition, a crave is prefixed for warrant to officers to search for, take possession of, and carry back the effects which had been on the premises since the beginning of the period for which hypothec is available.³⁰⁴ In following the course of a petition for sequestration, an attempt will be made to eliminate and consign to a note³⁰⁵ points of general procedure which have arisen in such cases, and to confine attention to the distinctive features of this process for recovery of rent.

²⁹⁹ *Infra*, p. 357. See *Robertsons v. Boswell*, 1777, 5 B.S. 477.

³⁰⁰ *M'Glashan, s.v.*; *Dove Wilson*, p. 431; forms in *Lees, Styles*, 326. As to Debts Recovery and Small-Debt Courts, see *infra*, p. 358. The procedure in Burgh Courts was the same (A.S., 12th Nov. 1825) but is now obsolete in this matter (*Law Courts Commission*, 4th Report, p. 38). The baron-baille's process is said to be also obsolete (*ibid.*, p. 39); but see *Tulloch v. D'Eresby*, 1834, 12 S. 754.

³⁰¹ The term of payment of the current rent being first come and bygone (in the case of *invecta et illata*) or, the residue after payment of rent due being to remain under orders of the Court (in the case of stock and crop).

³⁰² If the result of sale will be to reduce the subjects below value sufficient for hypothec a prayer for a plenshing order follows, *ut supra*, p. 351.

³⁰³ 16 & 17 Vict. c. 80, sect. 27, following and extending A.S., 11th July 1839, sect. 151; see *Stewart v. Wand*, 1842, 4 D. 622, *per* L.P. Hope.

³⁰⁴ *Lees*, 328; *M'Lellan v. Graham*, 30th June 1841, F.C. 1209.

³⁰⁵ *Henderson v. Warden*, 1845, 17 Sc. Jur. 271 (honorary sheriff-substitute); *M'Lellan, supra*,³⁰⁴ (misnomers, *induciae*); *Thomas v. Dumbreck*, 1834, 12 S. 285 (effect of admission on record); *Scott v. Erskines*, 7 S. 794 (*do.*); *Robertson v. Bryce*, 1834, 12 S. 893 (wakening, *obsolete*); *Bennie v. Mack* 1832, 10 S. 255 (restriction of conclusions); *M'Donell v. Cameron*, 1827, 2 W. and S. 595 (contingency); *M'Kechnie v. D. Montrose*, 1853, 15 D. 623 (forum); *Lawson v. Low*, 1845, 7 D. 960 (expenses and abandonment); *Torry v. Adam*, 1839, 2 D. 56 (advocation).

Procedure.

On the petition being presented, the sheriff at once sequestrates, grants warrant to inventory, and orders service and answers.³⁰⁶ In virtue of this warrant an officer of Court, in presence of a witness, makes an inventory, setting forth each article of furniture, and the number and description of stock and grain according to nature and locality,³⁰⁷ and returns an execution signed by himself and the witness. It is the invariable practice that the officer should visit the lands, and the practice must be followed; but in a case where, after visitation, an inventory of crop instead of stock was made up, and thereafter, without a second visit, a correct inventory of the stock was framed from information given by the tenant, the latter was held to be personally barred from objecting.³⁰⁸ The inventory is the only legal evidence of what has been sequestrated, so that nothing omitted from it is held to be attached,³⁰⁹ and the execution proved by the return completes the sequestration.³¹⁰ When a sequestration is known by the tenant to be impending, and he desires to be heard, he may lodge a caveat. If sequestration be threatened, and the tenant desires to have questions between himself and his landlord settled without waiting for the latter to move, he may apply for interdict.³¹¹ In both cases consignation or caution will, as a rule, be ordered.³¹² If articles which ought not to have been included in the inventory have been entered therein, the proper course is for the tenant or other party interested to apply in the process of sequestration to have them withdrawn therefrom; not to proceed by way of a separate process of interdict against their being sold.³¹³ The Court in 1839 provided that a judicial manager may be appointed 'to take charge of the sequestrated subjects;' as an alternative to requiring caution to be found that they shall be afterwards forthcoming.³¹⁴ The risk remains with the tenant; and it had been laid down, at an earlier date, that if, after sequestration, the tenant cannot afford to cut down his crop or is careless about it, the landlord may step in for the benefit of both parties without

³⁰⁶ A.S., 11th July 1839, sect. 150.

³⁰⁷ *Robertson v. Galbraith*, 1857, 19 D. 1016; *M'Kinnon v. Hamilton*, 1866, 4 M. 852; *Le Conte v. Douglas*, 1880, 8 R. 175 (pounding).

³⁰⁸ *Taylor v. Macknight*, 1882, 9 R. 857.

³⁰⁹ *Horsburgh v. Morton*, 1825, 3 S. 596 (N.E. 409), except offspring *in ventre*, which when produced go with the mother,

Lamb v. Grant, 1874, 11 Sc. L.R. 672.

³¹⁰ See *Robertsons v. Boswell*, 1777, 5 B.S. 477.

³¹¹ *M'Glashan*, 421; *Dove Wilson*, 435; *Gray v. Renton*, 1840, 3 D. 203.

³¹² *Ibid.*

³¹³ *Lindsay v. E. Wemyss*, 1872, 10 M. 708; see *M'Kechnie v. D. Montrose*, *supra*, ³⁰⁵.

³¹⁴ A.S., 11th July 1839, sect. 152.

liability for loss, unless it be caused through negligence.³¹⁵ But the landlord is not entitled in the ordinary case to make use of the sequestrated effects in prosecuting the business which his tenant had carried on.³¹⁶

The sequestration will be recalled on caution being found for Recall. the rent, or consignment of it being made, or on payment with expenses. It has been decided that the landlord must pay his own expenses when he has used sequestration in security and the rent is punctually paid when due.³¹⁷ The caution covers expenses of process.³¹⁸ And recall may be obtained, if the sum sought to be recovered is not rent in the ordinary sense,³¹⁹ or be rent for a period greater than the tenant's tenure,³²⁰ or for a subject partly withdrawn by the landlord,³²¹ or never possessed,³²² or justly abandoned,³²³ without such delay as involves liability for rent.³²⁴ Recall may be obtained, if the sequestration has been illegal, from the judge who granted it without the necessity for a reduction, since it was granted *de plano* without inquiry. The recall should be made by interlocutor of the sheriff; not by a mere certificate of the sheriff-clerk.³²⁵

By the sequestration the effects come to be *in manibus curiæ* Breach. and secure from being intermeddled with except on judicial authority. Breach of sequestration is, therefore, a contempt of Court—a delict or *quasi*-criminal offence,³²⁶ cognisable in the first instance only by the sheriff; not by the Court of Session³²⁷ except incidentally.³²⁸ It is no breach to take sequestrated grain for the use of the servants on the farm³²⁹ or of the stock or horses.³³⁰ In a very special case, where there was loose practice in the

³¹⁵ *Brims v. Ferrier*, 31st May 1815, F.C. 384; 2 B.C. 34; *More's Notes*, 85; *Ivory's Note to Ersk.* 2.6.41.

³¹⁶ *Lindsay, supra*, 313.

³¹⁷ *Gordon v. Suttie*, 1836, 14 S. 954; *Shaw v. Browne*, 1885, 1 Sh. Ct. Rep. 341; but see the judicious remarks in *Lees, Small Debt*, 40.

³¹⁸ *Clark v. Duncan*, 1833, 12 S. 158.

³¹⁹ *E.g.*, as in *Glen v. Roy*, 10 R. 239 (only annual value). See *infra*, p. 397, as to liquidate penalties.

³²⁰ *Tennent's Trs. v. Maxwell*, 1880, 17 Sc.L.R. 463.

³²¹ *Kilmarnock Gaslight Co. v. Smith*, 1872, 11 M. 58; see *Davie v. Stark*, 1876, 3 R. 1114.

³²² *Guthrie v. Shearer*, 1873, 1 R. 181; cf. *Tennent's Trs. v. Maxwell*,³²⁰; *Hoggs v. Caldwell*, 1882, 19 Sc.L.R. 452.

³²³ See cases of *Kippen v. Oppenheim*,³²⁵ and many others, *supra*, pp. 204, 221, which are *à fortiori*, being ordinary actions for rent.

³²⁴ *Campbell v. Boswall*, 1839, 1 D. 1023.

³²⁵ *Kippen v. Oppenheim*, 1846, 8 D. 957.

³²⁶ B. Pr. 1244.

³²⁷ *Monro v. Robertson's Trs.*, 1834, 12 S. 788.

³²⁸ *Muir v. Downie*, 1839, 2 D. 166 (in a bankruptcy sequestration).

³²⁹ Obs. in *M'Glashan v. D. Athole*, 29th June 1819, F.C. 765, 1 Bell, Leases, 414. If the views *supra*, p. 342, are sound, this rule would apply to domestic as well as farm servants.

³³⁰ *Miller v. Paterson*, 1831, 9 S. 792; *Gordon v. Suttie*, 1836, 14 S. 954.

Sheriff Court, leading to a removal of sequestered effects before the *nexus* was judicially loosed, the *bona fides* of the tenant saved him from punishment.³³¹ Breach of sequestration involves liability for all loss and damage caused, as well as such penalties as the Court may direct. Where there has been a plain breach (as where an officer of Court armed with a warrant to sell makes a return that he has found the premises void,³³² or the tenant fails to disclose what he had done with sequestered effects which have been removed³³³) the sheriff is entitled summarily to grant warrant of imprisonment till the goods are restored or caution be found or consignment be made. The rules regulating procedure in breach of interdict³³⁴ will probably be enforced *mutatis mutandis*, the contempt of Court being similar in most respects.³³⁵

Breach by third party.

Where the breach is committed by a third party, and there is no participation in a fraud, the usual penalty imposed on him is liability to restore the goods if still within his power, with damages, or to pay the rent with damages to the full extent of the loss and injury caused to the landlord, or, at least, up to the value of the effects removed.³³⁶ It has been pleaded that ignorance of the fact that sequestration had taken place is a sufficient defence, and it was held so to be in one case.³³⁷ But this view seems to be inconsistent with the cases of purchasers already cited,³³⁸ and, as to certain sorts of moveable property at least, with the universal knowledge of the risk an intro-mitter runs of coming into collision with the hypothec. In a case where furniture was pointed in ignorance of a prior sequestration, sold at the instance of the creditor after intimation of the *nexus* had been given to the auctioneer just before the sale, knocked down (in most part) to the creditor, and by him removed, the creditor was held liable for the appraised value,³³⁹ on the ground that though *in bona fide* when he pointed and advertised the sale, he was *in mala fide* when he removed the goods. But it was clearly pointed out that the excuse of *bona fides* could not

³³¹ Kippen v. Oppenheim, *supra*, ³²⁵ (no expenses to either party).

³³² Love v. Foster, 1832, 11 S. 280.

³³³ Goldie v. Oswald, 1839, 1 D. 426 (cheeses partly sold).

³³⁴ See the cases collected in Rankine, Landownership, 16, and add Macleod's Trs. v. Macpherson, 1883, 10 R. 792.

³³⁵ *E.g.*, with concurrence of the Crown when penalties are asked to be imposed. Goldie, *supra*, ³³³; but see Love, *supra*, ³³².

³³⁶ Jack v. M'Caig, 1880, 7 R. 465 (the former would be the safer alternative, leaving the intromitter to work out his remedy against the tenant).

³³⁷ Harper v. Laing, 1829, 4 F.C. 440.

³³⁸ *Supra*, p. 346, *Iy. Dun v. L. Dun*, 1624, M. 6217.

³³⁹ The landlord restricted the claim so far.

be trusted to by a poinder of furniture, who, knowing like everybody else of the existence of a law of hypothec, did not make diligent inquiry whether the vendor was or was not a tenant in arrear of rent.³⁴⁰

If a sequestration has been carried through without title,³⁴¹ or has been nimious—not being reasonably required for the protection of the landlord's interests³⁴²—or, being justifiable, has been conducted without a due regard to the tenant's interests,³⁴³ a claim lies for damages for wrongful sequestration. It is not necessary to clear the way for such a claim by first reducing the diligence.³⁴⁴ The proper form of issue asks a verdict that the sequestration was taken or proceeded with 'wrongfully,' not 'wrongously and 'oppressively,' nor 'maliciously and without probable cause.'³⁴⁵ The question so put is purely a jury question, as to which it is difficult to lay down any useful proposition of law. Where the objection is that sequestration should never have been resorted to, it is usually founded on the averment of counter-claims by the tenant against the landlord and of the solvency of the former,³⁴⁶ and the usual answer is that he is *vergens ad inopiam*, and that the counter-claims are illiquid and therefore uncompensable.³⁴⁷ Or an alleged error as to the term's rent which is secured may be the basis of the claim.³⁴⁸ Where the objection is to the mode of sequestrating, it is usually founded on gross over-inventorying beyond what was required to pay the rent,³⁴⁹ or on needlessly raising successive sequestrations.³⁵⁰ The question has been raised but not solved, whether the landlord is responsible for the proceedings of the auctioneer who carries out the sale.³⁵¹ Ruinous and illegal conduct in carrying through a sequestration in security, though it may found a claim of damages is not necessarily a bar to a warrant of sale being granted under the same original petition.³⁵²

(2) Sale.

If the sequestration be not refused or recalled, the next step

³⁴⁰ Jack v. M'Craig, *supra*,³³⁶ (the landlord's *mora* in intimating his sequestration was not enough to put him out of Court).

³⁴¹ Cf. Lyon v. Reid's Trs., 1835, 13 S. 984.

³⁴² See Oswald v. Græme, 1851, 13 D. 1229; Watson v. M'Culloch, 1878, 5 R. 843.

³⁴³ Robertson v. Galbraith, 1857, 19 D. 1016; Duffy v. Gray, 1858, 20 D. 580.

³⁴⁴ M'Leod v. M'Leod, 1829, 7 S. 396.

³⁴⁵ Watson v. M'Culloch, *supra*,³⁴².

³⁴⁶ Oswald, *supra*,³⁴².

³⁴⁷ Oswald, *supra*,³⁴²; Grainger v. D. Hamilton, 1822, 2 S. 100 (N.E. 93).

³⁴⁸ M'Intyre v. M'Nab's Trs., 1829, 8 S. 237, aff. 5 W. and S. 299.

³⁴⁹ Robertson v. Galbraith, *supra*,³⁴³.

³⁵⁰ Grainger, *supra*,³⁴⁷.

³⁵¹ Robertson v. Galbraith, *supra*,³⁴³.

³⁵² Duffy v. Gray, *supra*,³⁴³; as to measure of damages, see Mackenzie v. Lovat, 1883, 20 Sc.L.R. 694.

is to obtain from the sheriff a warrant to sell. When obtained, it must 'be carried into execution at the sight of the clerk of Court or other person authorised by the sheriff';³⁵³ and in every case where a sale follows on such warrant, the sale shall be reported within fourteen days after the date of the roup; and the principal roup-rolls or copies regularly certified must, within the same period, be lodged in process, together with an account of the expenses incurred in the sequestration and sale, and also a state of the debt due by the defender, showing the difference between the debt and the proceeds of the effects sold.'³⁵⁴ The gross proceeds may, if the sheriff see fit, be consigned. The accounts are taxed; the sale approved; the landlord paid in full or *pro tanto*; and the balance if any, after allowing for expenses,³⁵⁵ commission, and discounts on payments made by bill,³⁵⁶ paid over to the tenant. The balance is open to the diligence of ordinary creditors, including the landlord.³⁵⁷ The sale may go on, where interim execution is granted pending an appeal, but only on caution being found.³⁵⁸ After a sale the appropriate mode of setting aside the proceedings is by action of reduction.³⁵⁹

In Sheriff
Small-Debt
Court.

In the Sheriff Small-Debt Court,³⁶⁰ sequestration may be obtained by a landlord (*i.e.*, any person having a right to exact rent, whether as owner, liferenter, heritable creditor in possession, principal tenant or otherwise³⁶¹) or other person having right to rent and hypothec, provided the rent or balance of rent claimed do not exceed £12.³⁶² The officer when he executes the warrant gets the effects appraised by two persons³⁶³ who may also be witnesses to the sequestration. An inventory and appraisalment are given to the tenant who is cited conform to the third section of the Act. An execution of the citation and sequestration with the appraisalment is returned within three days. On hearing the

³⁵³ Auctioneer in *Love v. Foster*, 1832, 11 S. 280; and *M'Lellan v. Graham*, 30th June 1841, F.C. 1209.

³⁵⁴ A.S., 11th July 1839, sect. 150, repeating A.S., 12th Nov. 1812, 2.2.1.

³⁵⁵ *Galloway v. M'Pherson*, 1830, 8 S. 539 (though a little too much has been sold).

³⁵⁶ *Cargill v. Baxter*, 1829, 7 S. 662.

³⁵⁷ *M'Farlane v. Forrester*, 1823, 2 S. 505 (N.E. 445); *E. Morton v. Somerville*, 1765, M. 6197.

³⁵⁸ *Pentland v. Booth*, 1831, 9 S. 510 (bondholder).

³⁵⁹ *M'Lellan v. Graham*, *supra*, 353. See a case where a poinding creditor sold the goods and entered into possession of a farm and became liable for rents past-due and accruing—*Cooper v. E. Eglinton's Trs.*, 1829, 7 S. 831.

³⁶⁰ 1 Vict. c. 41, sect. 5, amended by 16 & 17 Vict. c. 80, sect. 26; *Lees, Small-Debt*, p. 36.

³⁶¹ Sect. 37 (principal Act).

³⁶² See forms of application and warrant, sched. B, annexed to the Act.

³⁶³ On oath—*Le Conte v. Douglas*, 1880, 8 R. 175.

application the sequestration may be recalled in whole or part, or decree pronounced for the rent found due and warrant granted for sale.³⁶⁴ If after sequestration the rent and expenses be paid, or the rent and £2 to cover expenses be consigned, the sequestration is *ipso facto* recalled on the clerk endorsing 'payment made' or 'consignation made,' and intimation being given to the sequestering creditor (sect. 5). The Act is extended by a later statute to sequestrations applied for *currente termino* or in security;³⁶⁵ but separate summonses must be given for rent current and rent past due. It is enough if the term's rent payable termly (for half-year, month, or week) be no more than £12, without regarding the rent for the *cumulo* period.³⁶⁶ By the 20th section it is enacted, that the overplus of the price³⁶⁷ must be returned to the owner of the goods, or consigned if he cannot be found. If the effects have not sold, they are delivered over to the creditor at the appraised value to the amount of the rent due and allowances. A report is made to the sheriff-clerk within eight days. Breach of sequestration infers summary punishment by fine or imprisonment, as for contempt of Court, besides liability otherwise as accords of law.

In the Debts Recovery Court sequestrations are competent for payment of the rent of houses (house-malls) where it or the balance claimed is over £12 and not over £50. By an incorporation of the 5th and 20th sections of the Small-Debt Act the procedure is assimilated.³⁶⁸ The question whether this process is competent for sequestrations in security depends on the other question whether the 28th section of the Act of 1853, referred to in last paragraph, is really declaratory. If so, it would be held that the incorporation in the Debts Recovery Act of the 5th section of the Small-Debt Act carries with it the declaratory extension; and this seems the sounder view.³⁶⁹

Every sequestration must be entered in a register kept by the Sheriff-Clerk or other officer of Court having custody of the records of the Court in which it is granted in, or as nearly as may be in, a form prescribed, containing the name of the tenant, the date of sequestration, name or description of the rural or urban subjects, the rent, date when payable, and the party taking out sequestration. The register is open to any one on payment of one shilling.³⁷⁰

³⁶⁴ On premises or a prescribed place, according to the mode appointed for poundings, &c., by sect. 20.

³⁶⁵ 16 & 17 Vict. c. 80, sect. 28.

³⁶⁶ Lees, 37.

³⁶⁷ Subject to expenses (sect. 32).

³⁶⁸ 30 & 31 Vict. c. 96, sects. 5, 16.

³⁶⁹ See Dove Wilson, p. 467.

³⁷⁰ 30 & 31 Vict. c. 42, sect. 7, and schedule.

In Debts Recovery Court.

Registration of sequestrations.

VII. *Forfeiture of Hypothec.*

The right to found on his hypothec may be lost, as to any particular term's rent, by the landlord in other ways besides the lapse of the period within which sequestration must take place.³⁷¹ Thus, there is no rule regulating the length of the period which may be allowed to intervene between sequestration and sale. Yet there can be no doubt that undue delay in pushing through a sale, as being needlessly embarrassing to creditors and purchasers, would raise a personal bar against proceeding with the diligence.³⁷² In one case *mora* of five or six months was not fatal, but there negotiations for a settlement had been going on during the interval, and the delay took place for the benefit and even at the desire of the creditors.³⁷³ Acquiescence by the landlord in a state of matters plainly inconsistent with the existence of hypothec for the time being may also infer abandonment.³⁷⁴ But this will not be readily inferred; not, for example, from his taking a bill for the rent;³⁷⁵ or allowing a pouncing creditor to sell on condition of being paid out of the proceeds the rent due.³⁷⁶

Recourse against Cautioner.

No attempt will be made here to explain the general law of cautionary obligations. It must suffice to point out how that law has affected the relation of landlord and tenant.

In writing.

The obligation must be reduced to writing,³⁷⁷ even though the lease itself be verbal.³⁷⁸ If improbable it may be set up by *rei interventus*, as, for example, by allowing the tenant to enter into possession on the faith of it.³⁷⁹ The ordinary form binds the lessee as principal and the cautioner as surety and full debtor for him, jointly and severally, and their representatives to make payment of the rent specified for a limited time (one year, three years, &c.), or during the currency. The obligation may, however, be purely subsidiary *ex facie*. It may be so conceived as to secure performance of other prestations, but is usually confined to the payment of rent. There seems to be no good ground for with-

³⁷¹ *Supra*, p. 337.

³⁷² 2 B.C. 32.

³⁷³ *M'Leod v. Thomson's Creds.*, 1805, Hume 226.

³⁷⁴ See *Anon. Ca. in 1 Bell, Leases*, 392, note.

³⁷⁵ *Swinton v. Stewart*, 1776, 5 B.S. 477; but the landlord cannot thus obtain

double payment—*Stevenson v. M'Cullochs*, 1821, 1 S. 30 (N.E. 30).

³⁷⁶ *Russel v. Cochrane*, 1831, 9 S. 304.

³⁷⁷ 19 & 20 Vict. c. 60, sect. 6.

³⁷⁸ Next case.

³⁷⁹ *Grant v. M'Donald*, 1827, 5 S. 317 (N.E. 294).

drawing caution in a lease from the operation of the section of the Mercantile Law Amendment Act,³⁸⁰ which abolishes the benefit of discussion unless it is expressly stipulated for.³⁸¹ This provision was not needed where the cautioner was taken bound as full debtor. Nor, according to what appears to have been the better opinion, was it required, in order to subject the granter of a letter guaranteeing payment of rent to immediate and direct liability.³⁸² A guarantee of that sort—‘to see the rents regularly paid’—does not cover expenses incurred in discussing the tenant by action, for that would be ‘to guarantee the litigious reasonableness of the tenant over whom the cautioner possesses no control whatever,’ and be contrary to the words of the guarantee.³⁸³

No benefit of discussion.

Guarantee.

If the obligation be contained in a lease containing a clause of registration for execution it may be enforced not only by action but also by summary diligence, since the cautioner is *in pari casu* with the principal.³⁸⁴ If not so fortified, the landlord must resort to ordinary action. ‘He is not obliged to have recourse to the ruinous diligence of sequestration on his hypothec before coming on the cautioner, it being the chief use of the cautioner’s obligation to avoid this necessity.’³⁸⁵ But if it be specially stipulated that the right of hypothec shall first be ‘exercised,’ the stipulation will be given effect to, and it will not be enough for the landlord to show that he had executed a warrant of sequestration. He must have exercised every right vested in him by the hypothec, including the right to sell.³⁸⁶

Remedies.

The cautioner, on paying up, has the usual right of relief against his principal and against co-cautioners, if any such there be. He has also a right to demand an assignation of the hypothec, so far as securing payment of rent recovered from him in this way by the landlord.³⁸⁷ It would appear that, though the landlord cannot refuse, and equity regards that as done which ought to be done, the cautioner is not secure against the competition of other creditors of the tenant unless, and until, he actually obtains an

Relief.

³⁸⁰ 19 & 20 Vict. c. 60, sect. 8.

³⁸¹ See the point discussed in 2 Hunter, 147. It arises, only and illegitimately, out of the preamble.

³⁸² See *M'Ewan v. Donald*, 1852, 14 D. 809; *Grant v. Fenton*, 1853, 15 D. 424.

³⁸³ *Grant v. Fenton*, *supra*, ³⁸², *per* L. Cockburn, p. 427.

³⁸⁴ *Supra*, p. 316.

³⁸⁵ B. Pr. 254, 1238, cf. 263; More's Notes, 108; *M'Queen v. Fraser*, 11th June 1811, F.C. 286; *Grant v. Macdonald*, ³⁷⁹.

³⁸⁶ *Mackenzie v. Fraser*, 1827, 5 S. 597, rev. 4 W. and S. 410.

³⁸⁷ 2 B.C. 33; B. Pr. 254, 1238; *Stewart v. Bell*, 31st May 1814, F.C. 638, and next vol. p. 499; contrast cases *supra*, p. 349.

assignation.³⁸⁸ If the cautioner have paid only bygone rents the assignation cannot be demanded except under burden of the landlord's preferable claim in security of future rents.

How extinguished.

The obligation comes to an end by discharge of the cautioner himself or the discharge of a co-cautioner without consent of the other, unless the party let out be bankrupt ;³⁸⁹ or by expiration of the period for which the caution was given, or of the lease itself, either in the ordinary course, or prematurely, as where an heir abandons claim to a lease.³⁹⁰ It does not expand along with a prolongation of the possession through tacit relocation.³⁹¹ It does not survive any material alterations in the conditions of the lease (such as a commutation of multure into money, where the subject let is a mill);³⁹² or a new lease;³⁹³ or eviction of part of the subject with consent of the landlord.³⁹⁴ Like other cautionary obligations it is discharged by the creditor giving the debtor time. Thus where for rent due at Martinmas the landlord took a bill in the following January, payable at a month's date, and for rent due at the next Whitsunday a bill payable on 31st May, the cautioner was relieved of liability for these rents.³⁹⁵

Septennial limitation.

It seems to have been taken for granted in a case which was ably pleaded, that the septennial limitation of cautionary obligations³⁹⁶ applies to caution for rent.³⁹⁷ The difficulties which beset the application of the Act which introduced this limitation to leases for years, did not there arise since the lease in question, was for a single year, and there could be no difficulty about 'the date of the bond,' which is the point of time from which the seven years run. It seems the better opinion that a continuing obligation—such as to pay an annuity³⁹⁸—does not admit of the limitation, even for instalments payable before the period of limitation ; and the same doctrine would probably hold in regard to guarantees of rent. Of course, those defences which, like the

³⁸⁸ *Garden v. Gregory*, 1735, M. 3390 ; 1 Bell, Conv. 286. Hunter (ii. 152) thinks this old rule obsolete, but recommends the cautioner not to trust to mere payment of the rent, but to get an assignation.

³⁸⁹ 19 & 20 Vict. c. 60, sect. 9.

³⁹⁰ *Low v. E. Rosebery*, 1812, More's Notes, 111.

³⁹¹ *Forbes v. Ly. Saltoun's Exrs.*, 1735, Elch. Cautioner, 4 ; More's Notes, 104.

³⁹² *Haddington Mags. v. Howden*, 1816, Hume 109 (though rent was

lowered, substantially a new tack).

³⁹³ *Monro v. Cameron*, 1821, 1 S. 19 (N.E. 20) ; so that new caution could only be proved by writ.

³⁹⁴ *M'Dougall v. Northern Ass. Co.*, 1864, 2 M. 935.

³⁹⁵ *Richardson v. Harvey*, 1853, 15 D. 628.

³⁹⁶ 1695, c. 5.

³⁹⁷ *Cochrane v. Fergusons*, 1830, 8 S. 324, 9 S. 501.

³⁹⁸ See L. Fullerton's op. in *Alexander v. Badenach*, 1843, 6 D. 328.

apocha,³⁹⁹ and the quinquennial prescription⁴⁰⁰ may be put forward by the tenant himself are equally competent to his cautioner.

On the other hand, the cautioner's liability is not terminated by mere withdrawal.⁴⁰¹ If he dies, it transmits against his representatives, without the necessity of any intimation to them. When a tenant's cautioner held a bond of relief from a third party he was held not precluded from founding on it, through not having intimated that sequestration and sale had taken place, and through not alleging that he had paid the rent.⁴⁰² Transmissibility.

³⁹⁹ *Supra*, p. 284.

⁴⁰¹ B. Pr. 266.

⁴⁰⁰ *Doull v. Home*, 1695, M. 2077; ⁴⁰² *Boog v. Jamieson*, 1825, 4 S. 117
Duff v. Innes, 1771, M. 11059; 1669, c. (N.E. 118).
 9. *Supra*, p. 286.

CHAPTER XVII.

MANAGEMENT : USUAL CONDITIONS.

At common
law.

By conditions
(covenants).

IN this chapter it is intended to gather together the rules which regulate the possession of the various subjects which are ordinarily let in Scotland—farms, arable and pastoral, dwellings, shops, factories, mines, and quarries,—either at common law without the help of stipulation or by virtue of express conditions—or, as they are sometimes called through the adoption of a term of English law, covenants. It is beyond the province of a treatise on law to canvass the policy or impolicy of making or adhering to any particular covenant.¹ It is enough to point out the mode in which certain usual conditions have been interpreted by the Court. The remedies appropriate for the enforcement of these conditions will be separately discussed. And the chapter will close with a few words on the important question what conditions do and what do not run with the land—binding the landlord and tenant, however they may have acquired right, or only personal between the contracting parties and their representatives.

A. RULES OF MANAGEMENT.

I. *In Agricultural Leases.*

Cropping
clauses.

The object of all clauses of management or cropping clauses in agricultural leases is to secure (so far as forethought and system can secure it) in improving leases, the amelioration ; in ordinary leases the preservation, of the capacity of the soil to produce crop and raise stock. These clauses sometimes contain and every

¹ As to agricultural and pastoral subjects, Mr. Stephens' remarks, like most of his opinions, are full of shrewd advice, §§ 3238 *seqq.* But the alteration which the Agricultural Holdings Act has already made and will still further make on the tenure of land should be kept in

mind. It may be anticipated that year to year agreements will gradually supersede leases for years—as to which see a comparison of the merits and defects of the two systems in § 3250. The balance seems to be turned in favour of short terms by the above Act.

lease implies an obligation to conform to the rules of good husbandry.² This is a somewhat vague, though very useful phrase, employed to describe generally the duty of a farmer to the land he farms and to the landlord to whom it belongs, varying, as that duty necessarily must, with the nature of the soil, latitude, height above sea-level, previous culture, neighbourhood to or distance from a large town, and even dependent to some degree on the nature of the subdivision of the farm, and the ordinary *sett* of the district in similar holdings. Deviation from the rules of good husbandry, when alleged, is tested by the report of a man or men of skill acquainted with the mode of cultivation in use in the district on similar farms.³ The custom of the district is culled from individual, unconnected instances, free from the disturbance of special agreement.⁴ These rules apply not only to leases for years but also to tenancies for a year or from year to year.⁵ Mere alteration in the system pursued during part of a lease may be *innocue utilitatis*, not preventible because not prejudicial to the landlord's interests. But where the rules of good husbandry are departed from, these interests are *ex hypothesi* endamaged, and the Court is bound to interfere. It is not enough that the tenant should leave the lands in as good a state as when he entered, if by adhering to the rules of good husbandry, they ought to have been improved; and in estimating the damage resulting from a departure from these rules, it will be necessary in most cases to fix on some standard of management—such as a particular shift—which may be reasonably held to have been incumbent on the tenant in view of the whole circumstances of each case.⁶

Good husbandry.

In aid of this implied obligation, it is the invariable practice in formal leases and in less formal missives, by reference or at large to insert express conditions. These vary in different parts of the country. It may be said that they are in most part conceived in enforcement of a particular rotation of crops,⁷ experience having shown that, except where unlimited supplies of manure are easily to be had, a system must be adopted in the sequence

Rotation of crops.

² *Maxwell v. M'Murray*, 1776, 5 B.S. 1025.
515.

³ *Hunter v. Miller*, 1862, 24 D. 1011, aff. 1 M. (H.L.) 49, 4 Macq. 560 (express obligation to conform to said rules as 'practised in the county').

⁴ *M. Tweeddale v. Brown*, 1821, 2 Mur. 563.

⁵ *Fleming v. Macdonald*, 1859, 22 D.

⁶ *Thomson's Repts. v. Oliphant*, 1824, 3 S. 275 (N.E. 194)—six-shift course selected. The lease was a long one, but the rule seems general.

⁷ The best description of rotations, esp. as to Scotland, is in Stephens' *Book of the Farm*, sects. 3086 *seq.*

During
currency.

Approaching
ish.

Regulations as
to outgoing.

Shifts.

of crops,—white, green fallow, or bare fallow, and grass, with sometimes black crop and other occasional products—in order to preserve the fertility of the land with the least outlay on extraneous manure. Thus (as to the currency of the lease) it may be stipulated that white crops which ripen their seeds shall not be taken in succession ;⁸ that a certain proportion shall be under turnip or bare fallow each year, and be sown with grass seeds along with the next white crop thereafter ; that farmyard dung, straw, and hay (or part thereof) shall not leave the farm.⁹ Or the rules of good husbandry may be relied on till within four or five years of the ish, when these or similar rules may come into force. At the ish, the tenant may be taken bound to leave so much land in grass ; to leave the whole dung of the penult crop with or without payment, and in the former case, to take payment according to valuation ; to leave the straw then unconsumed, as steelbow or on payment according to valuation ; not to sell the green crop during the last year ; and to sell the last crop, which is on the ground at the tenant's removal, to the landlord or incoming tenant at a valuation. If this last condition is not inserted the tenant may stipulate for the use of barns and other accommodation for thrashing out and disposing of the last crop.

It may be here observed that the ordinary rotation all over Scotland, except near to large towns and on heavy carse lands, is the five-shift course, which secures the inestimable advantage, on poor soil, of two successive years under grass.¹⁰ Near town, where police manure is accessible, a four-shift rotation is usual, if any rotation be adhered to.¹¹ The six-shift course is in vogue on certain good soils.¹² And a seven-field system is still known in the wheatlands of the Carse of Gowrie.¹³ It is obvious, on a

⁸ The most important of all, almost superseding the others (Stephens, sect. 2633 *seq.*) ; yet it is purposely and quite consistently with good husbandry abandoned in the seven-shift course of the Carse of Gowrie.

⁹ Sometimes as to turnips—not to be carried off, and one-half fed off by sheep *in situ*. Other occasional conditions relate to preserving old turf ; forbidding very scourging crops ; pairing and burning ; and breaking up pasture.

¹⁰ The series consists of fallow (green), wheat and barley (or oats), grass, grass, oats.

¹¹ Fallow (green), wheat and barley (or oats), grass, wheat and oats.

¹² Fallow (green) ; wheat and barley ;

grass ; oats ; beans, peas, and swedes ; wheat.

¹³ Bare (or sometimes green) fallow, wheat, barley, clover, oats, beans and peas, barley or wheat. It is unnecessary to give variants, and shorter or longer shifts. The particulars of each shift in the sett are detailed in Stephens, sects. 3092 *seq.*, and other books on agriculture. See the effect on grass at outgoing of a change from six-shift to five-shift during currency—Taylor *v.* Duff's Trs., 1869, 7 M. 351. The tenant cannot hark back in the last year—Cs. Stair *v.* Willison, 1883, 20 Sc.L.R. 314. See a case of impossible conditions—Colvin *v.* Dunbar, 1871, 8 Sc.L.R. 149.

little reflection, that there will often be much difficulty in changing from one rotation to another, especially if the subdivision of the farm has been made in contemplation of the old shift.

In regard to certain of the rules, it is possible and useful to discriminate between those (of less importance) which apply during the whole currency of the lease, and those which come to the front at or towards the ish, at a time when the relation between the parties is subject to the greatest strain.

1. *Management during Currency.*

The rules of good husbandry and the ordinary conditions as to cropping receive little if any illustration from our earliest text-writers¹⁴ and decisions.¹⁵ The Court early reached the sound

Functions of
the Court.

view of its functions by deciding that it could not make for the parties a contract as to the mode of cultivation which they had not made for themselves, but could only restrain unwarrantable acts when threatened, and indemnify for such acts when committed.¹⁶ If the lease insists on good husbandry but goes on to detail what the parties mean thereby, the tenant is absolved from liability for proved mismanagement if he have faithfully adhered to the course of cropping so laid down for his guidance.¹⁷ A tenant, who was not expressly bound to any rotation but simply to cultivate in a husband-like manner and not to outrun the farm by overcropping or other undue management, and to have one-fourth of the farm in pasturage at the ish, was proved in an action raised during the currency of the lease to have seriously miscropped the lands. He was held to be bound to crop according to one or other of the rotations in practice in the district, if suitable to his land.¹⁸ A tenant is not entitled to remove from the farm the straw or fodder¹⁹ (except hay and the straw of the outgoing crop) 'unless he either bargain with the purchaser for the dung produced from it or purchase as much for 'the use of the farm.'²⁰

Good husbandry.

Removing of
fodder and
straw.

Where two farms are held by the same tenant from different

¹⁴ Balf. 535; Cr. 2.9.2; St. 2.9.31; Bankt. 2.9.21; Ersk. 2.6.39; Spottisw. 367; Dallas is silent.

¹⁵ L. Haddo v. Johnston, 1633, and Murray v. Balcanquhal, 1665, M. 15257, seem to have been cases of *malâ fide* dilapidation just before removing. But see Hunter v. Miller, *infra*,⁴³; Hamilton v. Hamilton, 1825, 4 Mur. 6; Grierson v. Kerr, 1870, 7 Sc.L.R. 640.

¹⁶ Meldrum v. Gibb, 1737, Elch. Tack, 4.

¹⁷ Stark v. Edmonstone, 1826, 5 S. 45 (N.E. 42).

¹⁸ Carron Co. v. Donaldson, 1858, 20 D. 681.

¹⁹ D. Roxburghe v. Archibald, 1785, 5 B.S. 519; E. Northesk v. Rolland, 1797, M. 15254 (assignees and sub-lessees).

²⁰ Pringle v. M'Murdo, 1796, M. 6575. See a question raised as to clearing the ground of stones—Elrick's Trs. v. Duff, 1824, 3 S. 343 (N.E. 242).

proprietors, the tenant cannot be allowed to consume the green crop or fodder of the one farm upon the other, even though he bind himself to return an equivalent in dung, since the removal lessens the landlord's security.²¹ The rest of the decision in the case just cited—viz., that the tenant may not carry his grain from one of the farms where there is no threshing-machine, to be threshed on the other, though willing to find caution for its return—is at best of doubtful soundness,²² and the authority of the whole decision will disappear along with the right of hypothec which it was devised to protect.²³

2. *Management Towards and at Ish.*

There are three different conditions which have frequently come before the Court.

(a) *Grass at Ish.*

It is sometimes agreed that a certain portion of the land should, at the expiration of the lease, be left in grass.²⁴ This is a less burdensome obligation than a condition binding to a fixed rotation,²⁵ and has, so far as it goes, the same purpose—to secure that the outgoing tenant shall not take undue profit out of and to the detriment of the land. It is a definite obligation which can and must be strictly implemented.²⁶ It is not implied where there are no rules of cultivation prescribed, and the landlord has during the currency taken no objection to the ploughing up of grass lands.²⁷ Where the parties by verbal agreement (which was found sufficient) altered the sett of a farm from a six to a five-shift course, and thereby the amount of land in grass at the ish, it was held to be implied that a condition entered into on the one footing, entitling the tenant to payment for grass land, was to be altered so as to bring it into conformity with the rules applicable to the other footing, and that, therefore, the original claim for payment for second year's grass was superseded.²⁸ Where it was the custom of a district, and the practice of a farm in it to hain sown grass for hay from the early part of March till Whitsunday, failure to do so inferred liability for damages, which were estimated on the view that the failure applied to the whole hay-break, and not merely to the acreage

Effect of
change of shift.

Haining grass.

²¹ *Scott v. Durham*, 27th May 1813, F.C. 305.

²² See *Gordon v. Falconer*, 1822, 1 S. 386 (N.E. 361).

²³ See *supra*, p. 326.

²⁴ See *Thomson's Reps. v. Oliphant, supra*, ⁶.

²⁵ As to which see *Fraser v. Mac-*

donald, 1834, 12 S. 684; *Hall v. M'Gill*, 1847, 9 D. 1557.

²⁶ *Lyall v. Cooper*, 1832, 11 S. 96.

²⁷ *Fraser v. Maitland*, 1824, 2 S. Ap. 37.

²⁸ *Taylor v. Duff's Trs.*, 1869, 7 M. 351.

which the tenant got in hay at entry.²⁹ These conditions, like all others, are to be construed fairly and rationally and in search of the intention of the parties so far as expressed therein. Thus, where as alternative to an obligation to leave so many acres in five-year-old grass at outgoing, the tenant was in the lease permitted during those years to break the ground 'on paying to the landlord the sum of £5 of additional rent for each acre 'deficient,' and part of the old grass was lifted in the last year, the liability was confined to payment of £5 for each acre then ploughed, and was not extended to a similar payment for each of the five years.³⁰ An outgoing tenant bound himself to leave to the incoming tenant in grass certain fields and about twenty-three acres of another field 'consisting altogether of about ninety-seven acres.' It was held that he did enough when he gave over ninety-seven acres in grass; that allowance was to be made for inferiority in the quality of grass growing elsewhere than in the specified fields, and that natural grass land not in use to be ploughed was not to be included.³¹ Where the lands have been sublet, the obligation to leave grass is sufficiently implemented, if the stipulated quantity is left on the whole lands let, without its being divided proportionally among the different portions into which the subleases have divided them.³²

(b) *Conditions relating to Waygoing Crop.*

These relate almost exclusively to the white crop. Other crops may be dismissed in a few words. A tenant is entitled to sell or consume his last green crop—turnips and the like—off the ground.³³ As shall be shown presently, hay growing from seed sown with the penult crop and yielding its first crop in the year of removal, is regarded not as 'grass' but as 'crop.'³⁴ The presumption in favour of 'so many years, so many crops,' has been allowed to override the natural effect of a Whitsunday entry. Where that was the term of entry in a nineteen years' lease *inter*

²⁹ *M'Culloch v. Grierson*, 1862, 1 M. 53.

³⁰ *Suttie v. Somner*, 1828, 6 S. 1122 (the landlord gained, since the benefit of the long rest would not be exhausted by the first crop).

³¹ *Simpson v. Creighton*, 1823, 2 S. 405 (N.E. 360).

³² *Keith v. Logie's Heirs*, 1825, 4 S. 267 (N.E. 272). The rules as to entry to grass parks are stated, *supra*, p. 301.

³³ *Hamilton v. Reid's Trs.*, 1824, 2 S.

611 (N.E. 521); *Miln v. E. Dalhousie*, 1869, 6 Sc.L.R. 689.

³⁴ *Keith v. Logie's Heirs*, *supra*, ³⁴, approved in *Lyall v. Cooper*, *supra*, ²⁶; *M'Nee v. Carnie*, 1866, *Guthrie's Dec.* 345—the cases between heir and executor and between landlord and life-tenant's representatives (*Sinclair v. Dalrymple*, 1744, M. 5421; *Wight v. Inglis*, 1796, M. 5446; *Ms. Tweeddale v. Somner*, 19th Nov. 1816, F.C. 213) being regarded as erroneous and not to be extended.

Fruit.

alia of orchards, and it was proved that nevertheless the tenant had not reaped the fruit in the year of entry, he was held entitled to the fruit crop of the year of outgoing.³⁵

White crop.

The waygoing (awaygoing, outgoing, or last³⁶) crop is that which the tenant has sown during the last year of the lease, and which, after his removal at Whitsunday (which is the ordinary case in Scotland) from the houses and grass he is entitled to reap at the ensuing harvest. For this limited purpose he retains right of possession or rather of access until separation or sometimes till Martinmas, while for all other intents and purposes the removing is at the preceding Whitsunday.³⁷ So strong is the association between sowing and reaping that it does not yield to a decree of removing, but only to actual ejection; ³⁸ and even one who deserts possession after sowing, is entitled to reap on returning and paying arrears.³⁹

Outgoing
tenant takes
waygoing crop.

The rule is now settled that a tenant for years, with entry at Whitsunday and separation (or Martinmas) and corresponding ish, is entitled to the waygoing crop sown before the Whitsunday of the year of removal ⁴⁰ and to the first crop of sown hay reaped shortly after that term-day.⁴¹ The rule was applied though it had the effect in an improving lease, under which land in natural grass at entry had been broken up before the ish, of giving the tenant one more crop than he had been years in possession.⁴² Where a lease did not prohibit [though it did not enjoin] a six years' shift and the tenant till the last year followed a four or five years' shift, he was held entitled in the last year to adopt the six-shift course, and thus take a waygoing crop which he would not otherwise have had, on a report by a man of skill that the landlord would not be prejudiced.⁴³ But the rule yields to express ⁴⁴

³⁵ Forrester v. Thomson, 1828, 6 S. 875, aff. 4 W. and S. 136.

³⁶ The equivalence was pointed out in Drysdale v. Wemyss, 1848, 10 D. 467, aff. 6 B. Ap. 455—a case which otherwise raised a pure question of fact, see 6 B. Ap. 467.

³⁷ E. Hopetoun v. Wight, 1863, 1 M. 1097, aff. 2 M.H.L. 35, 4 Macq. 729; *supra*, p. 300.

³⁸ Gordon v. McCulloch, 1671, M. 13400, 15318.

³⁹ Downie v. Grahame, 1715, M. 14729, 15310.

⁴⁰ Fullarton v. Crawford, 4th March 1814, F.C. 581; B. Pr. 1269; More's Notes, 251; Ivory's Note to Ersk. 2.6.46;

Brodie's Note to Stair, 2.9.43; 2 Bell, Leases, 102, ignoring the mistaken judgment of the House of Lords in Scott v. Brodie, 1802, 4 Pat. 311, see M. Appx. Tack, 8; Keith v. Logie's Heirs, *supra*, ³²; Harvey v. King's College, 1845, 8 D. 151 (equivalent to a Whitsunday and separation outgoing).

⁴¹ Keith, *supra*, ³².

⁴² *Ibid.*; Baird v. Harper, 1865, 3 M. 543 (lifting old pasture as he was entitled to do); it is of no consequence in what year the change is made, *ibid.*

⁴³ Hunter v. Miller, 1862, 24 D. 1011.

⁴⁴ M'Michan v. Hutcheson, 1801, 4 Pat. 170, 2 Bell, Leases, 201 (leave the whole lands).

or clearly implied⁴⁵ stipulation to the contrary. Thus where the assignee to a lease of grass parks contiguous to and let with a mansion-house, without prohibition against cropping them, lifted certain of them, cropped them for five years before the ish, which was Whitsunday for the whole subjects let, without complaint or interruption, and proceeded to till and sow the same quantity of land shortly before the said ish, it was held that not he but the incoming tenant had right to the crop of that year, subject to reimbursement for the expense of seed and labour.⁴⁶

It is necessary to notice shortly the rules which govern the right to the last crop in the now uncommon case of a liferent lease. The heir of a liferent tenant is entitled to reap crop so far as his ancestor had sown it on paying a proportion of the rent.⁴⁷ Conversely he is entitled to recompense for the labouring by his ancestor of land which had not been sown by him.⁴⁸ But hay produced from seed sown with white crop in the year preceding the date of a liferent tenant's death goes to the landlord.⁴⁹ The representatives of a liferent tenant with a Whitsunday and separation entry were by his lease entitled on his death to possess and crop the farm for one year more. He died in September when part of the crop had been reaped and some of the next year's wheat had been sown. It was held that the year of grace was the year of the next crop, not of the crop succeeding it.⁵⁰ The representatives of a liferent tenant were bound by his lease to remove at the Whitsunday immediately after his death, which occurred in March. They were proceeding to plough up and sow the land as if the lease were still in full operation down to the following Whitsunday when they were interdicted—with reason, as was held by the House of Lords, since the delay in removal did not *per se* entitle them to cultivate during the interval, but was intended only for the personal convenience of the possessors.⁵¹

It is a not unusual condition that the landlord or incoming tenant should have right to take over at a valuation the last crop at any time before it is reaped,⁵² or by having the crop measured

Liferent tenant.

Waygoing crop taken over.

⁴⁵ Brodie v. Murdoch, 1777, M. Appx. Tack, 3 (Whitsunday the *only* ish); Blair v. Lyall, 1826, 4 S. 365 (N.E. 369)—separate pendicle.

⁴⁶ Gray v. Goldie, 1800, Hume 804.

⁴⁷ As to removing him, see chap. xxi.

⁴⁸ Stewart v. Grimmond's Reps., 1796, M. 13853, Hume 561.

⁴⁹ Cases in ³⁴, *supra*, of doubtful authority.

⁵⁰ M. Tweeddale v. Somner, 1845, 17 Sc. Jur. 198.

⁵¹ Ms. Tweeddale v. Murray, 1846, 8 D. 411, rev. 6 B. Ap. 125.

⁵² See Nivison v. Howat, 1883, 11 R. 182.

after cutting ;⁵³ the market value being taken, not the value for consumption on the farm.⁵⁴ The intimation by the landlord or the incoming tenant of his intention to avail himself of a stipulated option to take over the outgoing crop on terms need not be in writing.⁵⁵

Storage of
crop.

If this condition be not inserted, there should be express provision made for stowing away that crop in the barns and yards (which in other respects have passed into the possession of the incoming tenant) and for thrashing it out on the farm preparatory to sale or removal. If there be no such provision, it is clear law that an outgoing tenant with a Whitsunday (and separation) ish has no such right, his right of possession (or access) after Whitsunday being confined to the reaping and carrying away of the crop,⁵⁶ and, probably also, during this 'transition period' a continuation of any right he may have had during his lease to destroy rabbits, so far as is necessary in order to protect the crop.⁵⁷ Thus an outgoing tenant in Morayshire (there being no contrary custom in that district) was held not entitled to retain his thrashing-mill on the steading in order to thrash the waygoing crop, nor to use the barn or stackyard for storing it.⁵⁷ And, if a lease prescribes a removing from the arable land at Michaelmas, the tenant must give up the accommodation for thrashing and storing his last crop at that date and make arrangements otherwise, however awkward and unsuitable the term may be.⁵⁸ But if an extraordinary removing be ordered to take place within a short period, the tenant is entitled to a reasonable time thereafter and proper accommodation to thrash out grain still in stack and to dispose of cattle.⁵⁹ And the rule yields also to local custom, which naturally springs up, especially in localities where the climate is moist and markets are remote. The grace thus allowed may extend till April, Whitsunday, or even later into the first year of the new lease ;⁶⁰ and an ejection of the tenant before its close involves liability for damages.⁶¹

Bare fallow.

Bare fallow,⁶² once the stock device for preventing exhaustion

⁵³ *Still's Trs. v. Chivas*, 1829, 8 S. 9.

⁵⁴ *Erskine's Trs. v. Crombie*, 1870, 9 M. 54 ; see *Lindsay v. Bell*, 1862, 1 M. 39.

⁵⁵ *Duke v. Ferguson*, 1862, 24 D. 547.

⁵⁶ *Gatherer v. Cumming's Trs.*, 1870, 8 M. 379. In *Macewan v. Paterson*, 1803, M. 13891, Hume 571, the outgoing tenant was allowed to remain till Martinmas.

⁵⁷ *Gatherer, supra*, 56.

⁵⁸ *Anderson v. Tod*, 1809, Hume 842.

⁵⁹ *Finlayson v. Peddie*, 1829, 7 S. 617 (3 weeks fixed of consent).

⁶⁰ *Gordon v. Robertson*, 1825, 2 Bell, Leases, 388, *per* L. Cringletie.

⁶¹ *M'Leod v. Crawford*, 1816, noticed in Hume, *supra*, 53.

⁶² See obs. as to the meaning of the term 'fallow' in *Thomson v. Jamieson*, *infra*, 67.

of the soil but now only practised (voluntarily) on certain stiff clays is a denial of immediate in the hope of speedy advantage, —a loss to an outgoing, and a gain to an incoming tenant. The loss may have to be set against the corresponding gain which the outgoing tenant had obtained through a similar arrangement at the beginning of his own lease ; in which case he must leave as much fallow when he removes without compensation.⁶³ And if the position of the parties is fully set out in the lease its terms must be observed though the effect be to exclude a claim for recompense which would otherwise have emerged, as where a portion of the land let was reserved by the landlord to be at the ish in fallow or green crop and the tenant was to receive merely a certain sum per acre for ploughing it up.⁶⁴ But, where there is neither antecedent equivalent nor express condition, the rule is that, since the outgoing tenant would have been entitled to take another crop instead of leaving fallow he has right to recompense from the landlord and incoming tenant, there being a direct claim against both.⁶⁵ The measure of the claim is ‘ the difference ‘ between the return from the farm during the last year with ‘ the fallow so left and what it would have been if a crop had ‘ been taken off the fallow land ; ’⁶⁶ the main elements in the problem being the cost of time, manure, labour, &c., in preparing the land for the crops which another is to reap. The rule applies only to bare or summer fallow, *i.e.*, land left without a crop, and not to green crop or green fallow, which, under the improved modern system of farming has in most part superseded it. So that on general principles as well as on a collation of the whole lease it was held that compensation ‘ for labouring and ‘ manuring the fallow-break ’ as well as ‘ for the value of the ‘ land left in bare fallow ’ did not include compensation for expenditure on land from which the tenant (who had a Martinmas ish) had taken a waygoing crop of turnips, potatoes, and beans.⁶⁷ The obligation of the incoming to reimburse the outgoing occupant is said to be so strong as to apply even where the landlord himself (who has had the land in his own hands) is the disburser ;⁶⁸ and probably also where the landlord has reserved

Recompense
for it.

Not for land in
green fallow.

⁶³ Brown v. Coll. of St. Andrews, 1851, 13 D. 1355.

⁶⁴ Shireff v. L. Lovat, 1854, 17 D. 177.

⁶⁵ Purves v. Rutherford, 1822, 2 S. 59 (N.E. 53) ; Simson’s Tr. v. Carnegie, *infra*,⁷⁰ ; B. Pr. 1263.

⁶⁶ Marshall v. Walker, 1869, 7 M. 833, *per* L.P. Inglis.

⁶⁷ Thomson v. Jamieson, 1874, 1 R. 895.

⁶⁸ Marshall, *supra*,⁶⁶, *sed quære*, since the claim then resolves into one by the landlord *quæ* disburser against himself *quæ* landlord, and there is no presumption that the rent was fixed apart from a consideration of this important advantage in the first year.

in the expiring lease an option to make the disbursements himself instead of the outgoing tenant but has not availed himself thereof and they have been made before the new lease is signed.⁶⁹

Grass seeds.

The same rules regarding compensation apply to the cost of grass seeds sown down by an outgoing tenant with the last white crop.⁷⁰ If the outgoing tenant is bound to harrow in grass seeds and the failure of the crop of hay can be traced to negligence therein and to no other cause, he will be liable in damages.⁷¹

(c) *Conditions relating to Dung and its Ingredients.*⁷²

Of penultimate crop.

The rule that a tenant cannot, unless specially authorised, remove from his farm any part of the straw⁷³ applies as strongly to that which is made of the penultimate, as to that which is made of any earlier crop. It must be consumed on the farm and be made into manure for the waygoing crop.⁷⁴ Before the introduction of turnip husbandry, this straw, as an element of farm-yard dung, was laid on the bear or barley land at some period in April or early in May, and it was only such manure as was made subsequent to that period that belonged to the outgoing tenant and entitled him to recompense, if he was restrained from removing it.⁷⁵ In modern practice the dung is laid on the turnip or fallow break, and compensation can only be demanded for such part of it as has been lawfully withheld, or on account of the ish being later in the year than Whitsunday has not been made before the time of preparing the turnip or fallow land. But without express bargain, a different rule may be gathered from the general management of the farm. Thus where the removing was at Whitsunday and separation, and the tenant was bound to consume on the farm the whole fodder except the hay and fodder of the last crop, the practice had been during the whole course of the lease without challenge, and in conformity with the rules of good husbandry as applicable to wheat land, to reserve part of the dung to be laid on the wheat land in autumn instead of using the whole of it for the spring crops. The outgoing tenant was held entitled to compensation, first, for the reserved dung left on the farm unused at

How far compensated for.

⁶⁹ Simson's Tr., 70.

⁷⁰ Simson's Tr. v. Carnegie, 1870, 8 M. 811; M'Intyre v. Anderson, 1872, 10 Sc.L.R. 59.

⁷¹ Graham v. Lindsay, 1861, 23 D. 440.

⁷² See as to steelbow, *supra*, p. 256; and M'Neal v. Smith, 1886, 2 Sh. Ct.

Rep. 331.

⁷³ *Supra*, p. 256.

⁷⁴ Forrester v. Wright, 1808, M. App. Tack, 16; D. Roxburghe v. Robertson, 1816, Hume 867, rev. 2 Bligh 156; Clerk v. Hamilton, 1801, Hume 867 n.

⁷⁵ Finnie v. Mitchell, 1767, M. 15260; Forrester v. Wright, 74.

the Whitsunday of outgoing, being no more than he had been in the use of reserving and being wholly employed for the benefit of the landlord and incoming tenant, and secondly, for straw on the farm at the said Whitsunday, being no more than would have been necessary to fodder his bestial till separation.⁷⁶ Further, it has been held that where a tenant on entry received, without expressly paying for it, fallow ground prepared with a certain quantity of manure, he was bound to leave the same state of things at ish, and was entitled to payment for surplus manure only.⁷⁷

The common law relating to the fodder of the penultimate crop may be either formulated or innovated on by stipulation. Thus an obligation incumbent on a tenant 'during the currency of this lease, to consume upon said lands the whole straw and fodder of every kind except hay produced by said lands, and to lay the whole dung thereby produced on said grounds,' excludes him from claiming compensation for manure produced from that crop and hained at the ish.⁷⁸ The exclusion is strengthened (if at all) if besides excepting hay there be an exception of the fodder of the waygoing crop, and it is not affected by the fact that at his entry the tenant had paid for the manure taken over by him.⁷⁹ There is a similar exclusion where the obligation is to leave the manure on the farm at expiration of the lease.⁸⁰ But an alleged usage on a small estate is not allowed to interfere with the common law rules as to compensation.⁸¹ In the unusual case of removing from the houses and grass at the Whitsunday after (not before) the tenant's last crop, he must consume the fodder of that crop during the period between separation and outgoing.⁸²

The meaning of express conditions entitling a tenant to recompense for manure left on the lands at outgoing has not been much elucidated by decisions. Where the stipulated ish is at Martinmas and Whitsunday after the last crop, and the tenant was bound to consume the fodder on the land, and to leave behind what was not consumed in the last year on getting payment of the 'winter dung,' this term was held as including not

⁷⁶ *Berry v. Allen*, 1827, 5 S. 212, aff. 3 W. and S. 417 (the second point seems open to question).

⁷⁷ *Brown v. Coll. of St. Andrews*, *supra*, ⁶³ (the lease was lost).

⁷⁸ *E. Wemyss v. Wright*, 1801, M. App. Tack, 7; *Forrester v. Wright*, *supra*, ⁷⁴ (a nearly identical condition).

⁷⁹ *Greig v. Mackay*, 1869, 7 M. 1109 (diss. L.J.-C. Moncreiff).

⁸⁰ *Stirling v. Yuille*, 1827, 6 S. 251; see *Lyle v. Graham*, *infra*, ⁸².

⁸¹ *Allan v. Thomson*, 1829, 7 S. 784 (four farms).

⁸² *Stirling*, *supra*, ⁸⁰.

only the dung made during the last winter but all the dung made since the waygoing crop was prepared.⁸³ A lease after providing for consumption of the straw on the ground, and for the straw of last crop being left, with a year's dung and a fallow break, proceeded thus: 'But although the straw is declared steel-bow, the tenants are to be allowed the price of the year's dung 'to be left for the fallow-break.' The effect of this was that the tenants were entitled to the full value or market price of the dung, not merely a fractional part thereof corresponding to the benefit of it for one crop.⁸⁴

Straw of waygoing crop—belongs to the quitting tenant,

In regard to the straw of the waygoing crop, another set of considerations emerges. 'By the custom of Scotland . . . —i.e., 'the prevailing usage of a great part of Scotland—where there is 'no stipulation between a landlord and tenant with respect to the 'straw or fodder, the tenants usually enter after the regular expiration of the term to reap the crop, and therefore, having the 'crop to reap after the expiration of their term, are entitled, 'where there is no stipulation to the contrary, to take away the 'straw of the waygoing crop. . . . In parts of Scotland, particularly in East Lothian and Berwickshire, the custom prevails 'that the incoming tenant has the straw of the last crop of the 'outgoing tenant, and then he leaves on the land he is quitting 'the straw of his last crop, and this is called receiving in steel-bow.'⁸⁵ Consequently, the straw and dung of the last crop are, in the absence of stipulations in the landlord's favour, pounceable by creditors of the outgoing tenant.⁸⁶

unless otherwise stipulated.

So strong is the equity of the rule set out in the earlier part of this passage, that the Courts in Scotland have shown the greatest unwillingness to see in any general phraseology applicable to the whole currency of the lease a displacement of it, and the House of Lords has on no fewer than three occasions had to remind them of their duty to interpret plain words in their plain sense, without reference to local usage or other extraneous circumstances, such as the state of matters at entry.⁸⁷ In the earliest case, the lease, after providing for dung being left on the ground at a valuation, stipulated that 'at no time shall' the tenant 'sell or give away any of the hay or straw of the said

⁸³ Lyle v. Graham, 1824, 3 S. 125 (N.E. 84).

⁸⁴ Herriot v. Halket, 1826, 4 S. 446 (N.E. 452).

⁸⁵ Per L. Gifford in Gordon v. Robertson, 2 W. and S. 133; and see the opinions of the Court of Session Judges,

ibid., p. 120, and cases there cited.

⁸⁶ Dun v. Johnstone, 1818, Hume 451.

⁸⁷ B. Pr. 1261; More's Notes, 253. See a case in which there were no steading or offices on the farm—Mitchell v. Adam, 1866, 3 Sc. L.R. 247.

'farm, which shall always be spent on the farm.' The Court of Session allowed the outgoing tenant to sell the straw of the waygoing crop; but the House of Lords reversed, the only difficulty in construction, viz., that the hay and straw should be spent on the ground (which it was out of the power of the tenant to secure), being overcome by the observation that there was no obligation on the tenant himself so to spend it.⁸⁸ In the next case, articles of lease bore as follows: 'The whole fodder to be used upon the ground and none sold or carried away at any time, hay only excepted; and all the dung to be laid upon the farm the last year of the lease.' The House of Lords, reversing a judgment of the whole Court, was unable to distinguish this stipulation from that which came up for construction in the last case.⁸⁹ The same clauses in the same articles subsequently came before the Court of Appeal with the same result.⁹⁰ Profiting by the hint contained in the Lord Chancellor's opinion,⁹¹ in the first of these cases, that if the obligation had been imposed upon the tenant himself to spend the straw on the farm, the stipulation might have been read as applicable to the straw of all other crops except the last, it has been held that where a tenant was bound 'to consume the whole straw, turnips, and other fodder raised on the farm with the exception of clover hay, which he is permitted to sell for consumption elsewhere,' he was entitled to sell or carry off the straw of the waygoing crop. This doctrine was based on the impossibility of such consumption by the tenant, so far as the waygoing crop was concerned, on the fact that the stipulation about clover hay did not apply to the last crop (since the young grass was to be paid for), and the absence of the emphatic prohibition of removal of straw 'at any time.'⁹² Though a tenant is prohibited in his lease and has been interdicted from carrying off any of his fodder, it is no breach of interdict to remove part of it, contained in stacks infested with vermin, to a neighbouring farm to be thrashed, provided the straw be returned immediately.⁹³

⁸⁸ *D. Roxburghe v. Robertson*, 1820, 2 Bligh 156, 6 Pat. 614.

⁸⁹ *Gordon v. Robertson*, 1825, 3 S. 656 (N.E. 458) (L. Cringletie alone dissented), rev. 2 W. and S. 115.

⁹⁰ *Gordon v. Anderson*, 1825, 4 S. 13 (N.E. 14), rev. 3 W. and S. 1. In the sequel, the landlord claimed damages, the fodder having rotted in the tenant's hands, but was denied his remedy by

what may be regarded as an unsound judgment, 1833, 11 S. 647, aff. 7 W. & S. 545.

⁹¹ At 2 Bligh, 166; See L. Cowan's obs. on the distinction in *Greig v. Mackay*, *supra*,⁷⁹ at 7 M. 1111.

⁹² *L. Elibank v. Scott*, 1884, 11 R. 494.

⁹³ *Gordon v. Fiddler*, 1823, 2 S. 486 (N.E. 430).

Taken over at valuation.

It is usual to arrange in leases for the landlord and incoming tenant having the option to take over the last crop—and as part of it the straw—at a valuation.⁹⁴

II. *In Pastoral Farms.*

The only items of management which have received illustration from statute or judicial authority relate to ploughing up grass,⁹⁵ and to winter-herding, and march fences (the two last of which will be noticed when treating of the relations of landlord and tenant with third parties⁹⁶), and to muirburn, which falls more conveniently within the chapter on game.⁹⁷

III. *In Urban Subjects.*

Express conditions.

Enough has been said on an earlier page, when treating of right of possession, concerning inversion of possession and the limits within which alone structural alterations may take place.⁹⁸ These two subjects embrace all the restrictions which the common law of lease introduces into questions between landlord and tenant. There will be another opportunity of considering the restrictions due to neighbourhood, that is to say, in questions with third parties.⁹⁹ It remains to collect here such special conditions regarding the use of the subjects let, as have occurred, may probably occur again, and have been subjected to judicial interpretation. The views adopted by the Judges in each case require to be studied with care in the light of the whole lease and the whole circumstances before them at the time, and cannot be implicitly relied on in seeking to interpret another deed. There is no difference in the principles of construction between the Scotch and the English law, and between feus and leases. The authorities are, therefore, taken from all these sources indiscriminately.

Construed in favour of liberty.

The rule of interpretation in construing conditions in a long lease is unquestionably like that which obtains in regard to feuing conditions—in favour of freedom.¹⁰⁰ The same rule seems to hold in the case of short or ordinary leases, though perhaps with diminished force, since the freedom of the lessee may, within a short period, become the bondage of the landlord on re-entering. The Court, when called on to adjust a formal lease, will decline to add any stipulation at variance with the common law or ordi-

⁹⁴ See *Nivison v. Howat*, 1883, 11 R. 182. As to set-off by illiquid claim for misappropriation see *Gray v. Forbes*, 1872, Guthrie's Dec. 292.

⁹⁵ *M. Tweeddale v. Brown*, 1821, 9 Mur. 563 (in last year).

⁹⁶ Chap. xxv.

⁹⁷ Chap. xviii.

⁹⁸ *Supra*, p. 214.

⁹⁹ Chap. xxv.

¹⁰⁰ *Heriot's Hosp. v. Ferguson*, 1773, M. 12817, aff. 3 Pat. 474, and other cases collected in Rankine, *Landownership*, 398.

nary style to the conditions contained in concluded missives.¹⁰¹ The lessee, by accepting his lease under conditions, concedes the landlord's interest to enforce them, and cannot escape liability without proving that this interest had ceased to exist in the interval.¹⁰²

The rules which regulate the power to assign or sublet;¹⁰³ the obligation to reside;¹⁰⁴ the redelivery of fixtures;¹⁰⁵ insurance against fire;¹⁰⁶ the obligation and right to take and maintain possession;¹⁰⁷ with the conventional variations and innovations on the rights and obligations concerned therewith have been already adverted to. The conditions which remain for discussion are mainly directed, *first*, against the landlord, to prevent his setting up a rival trade in the neighbourhood, and, *secondly*, against the tenant, to prevent (a) his building on the subjects let, (b) setting up any trade or business therein, (c) setting up any noxious trade, (d) setting up any particular trade, and (e) dealing with particular persons. Of these in order :

Conditions already noticed.

1. *Restriction on Landlord setting up a Rival Trade.*¹⁰⁸

It has been already pointed out that it is a breach of warranty, if the landlord, contrary to the good faith of the contract and apart altogether from special stipulation, sets up a rival trade in premises so situated that the business for which the subjects were let is materially prejudiced.¹⁰⁹ An action of damages on this ground having been raised, arrestment and inhibition having been used and recalled on consignment of a sum, and an award of damages having been obtained payable by equal instalments during the remaining years of the lease, the consigned money was held to be repayable to the landlord only on his finding caution for payment of the instalments down to the date of a break, which had been agreed on in the tenant's option, the ratio being that the debt was not in any proper sense either contingent or future.¹¹⁰ The common law right may be fortified by special conditions. Thus, where a landlord undertook that an adjoining shop belonging to him should not be let to any person in a particular trade, the restriction was held (or admitted) to preclude the landlord himself from using it for that trade, even

Rival trading by landlord.

¹⁰¹ Campbell v. Ralston, 1842, 4 D. 1310.

¹⁰² E. Zetland v. Hislop, 1881, 8 R. 675, rev. 9 R.H.L. 40 ; 7 App. Cas. 427.

¹⁰³ Supra, p. 157.

¹⁰⁴ Supra, p. 213.

¹⁰⁵ Supra, p. 257.

¹⁰⁶ Supra, p. 210.

¹⁰⁷ Supra, p. 184.

¹⁰⁸ See the general law as to contracts in restraint of trade in notes to Mitchell v. Reynolds, 1 Sm.L.C. 431 ; Pollock on Contracts, 326 ; B. Fr. 40.

¹⁰⁹ Supra, p. 201.

¹¹⁰ Smith v. Cameron, 1879, 6 R. 1107.

though the business conducted by him therein competed with that of the tenant in certain small articles only, the extent of the rivalry being material and substantial.¹¹¹ But where the restriction was that the landlord should not let any tenements in part of a certain street 'for the purpose of carrying on the trade or 'business of an eating-house' (not, it is to be observed, 'let or 'permit any of the tenements to be let' for that purpose), it was held not to be broken where the landlord let premises in that street to a tenant whose assignee exercised there that trade without being restrained by the landlord, as it was in the power of the latter to do; since the landlord was not in any sense the first tenant's trustee.¹¹²

2. *Restrictions on Tenant.*

(a) *Building on the Subjects Let.*

In so far as building or structural alteration is inversion of possession, it may be restrained at common law.¹¹³ Special conditions in regard to building are more commonly to be found in feu-rights than in leases. It would lead too far into that department of the law to attempt any elucidation of the doctrine in this place.¹¹⁴

(b) *Setting up any Trade or Business on the Subjects Let.*

The object of such conditions is to secure that the premises shall not be used in any other way than as dwelling-houses. This end may be obtained directly by explicitly stipulating that they shall only be used for that purpose; and then the condition will be broken by putting up a blind in a window with a business sign inscribed;¹¹⁵ or by erecting a studio with the necessary rooms connected therewith in the garden; or by building a stable, though it has a bedroom over it;¹¹⁶ or by using a house as a large school for girls, intended to accommodate about twelve boarders and fifty day scholars.¹¹⁷ Where feu-rights allowed offices to be built on the background of a building-stance but provided that as the houses were 'intended to continue permanently as dwelling-houses, neither they nor the offices should 'be converted into shops, warehouses, or trading places of any

Prohibition
against trad-
ing.
Dwellings
exclusively.

¹¹¹ *Davie v. Stark*, 1876, 3 R. 1114.

¹¹² *Kemp v. Bird*, 5 Ch.D. 974; cf. *Master v. Hansard*, 4 Ch.D. 718.

¹¹³ *Supra*, p. 214.

¹¹⁴ See the authorities collected in Rankine, *Landownership*, pp. 385 *seqq.*, and add *Pocock v. Gilham*, 1 C. and E. 104 (advertisement hoarding).

¹¹⁵ *Wilkinson v. Rogers*, 2 De G. J. and

S. 62; see a more particular restriction against any outward mark of business in *Evans v. Davis*, 10 Ch.D. 747.

¹¹⁶ *Patman v. Harland*, 17 Ch.D. 353. See the converse case (offices not dwelling-houses) *Murison v. Wallace*, 1883, 10 R. 1239.

¹¹⁷ *Ewing v. Husties*, 1878, 5 R. 439.

'description,' it was the opinion of two of the Judges that there was no prohibition of the use of the houses as a school; but the point did not have to be decided.¹¹⁸ A condition that no building to be erected on land let 'should be used or occupied otherwise than as and for a private residence only, and not for any purpose of trade,' was broken by the erection of a building adapted only for use as a school or institution, and intended to accommodate one hundred girls, though the education was gratuitous and no profits could be made.¹¹⁹ And where a house was to be used solely as a dwelling-house and 'any public business' within it was prohibited, the condition was broken by using it as a day school and dancing academy.¹²⁰ It is no breach of a prohibition of trade or business to allow a sale by auction of the furniture in the house let;¹²¹ but an express prohibition against permitting a sale by auction may be broken by putting a third party in the way of being able to force on such a sale.¹²² Again, the same end may be attained by prohibiting the carrying on of any trade or business on the premises without setting out the purpose of the prohibition. It is settled that it is not essential that there should be payment taken in order to constitute a business, and that payment does not necessarily make that a business which without payment would not be a business.¹²³ Thus, a charitable institution called a Home for Working Girls, where the inmates were provided with board and lodging, was a business, whether payment was taken or not;¹²⁴ and the same remark applies to a hospital.¹²⁵ The word 'trade' has a more restricted meaning.¹²⁶ It has never been settled, but it would probably be held that the letting of lodgings as ordinarily carried on is a 'business.'¹²⁷

Trade prohibited.

(c) *Setting up any Noxious Trade.*

A lease granted knowingly for a purpose which is *contra bonos mores* or otherwise unlawful—as, for example, where a house is let to be used as a brothel—cannot of course give right of action to either party.¹²⁸ But a use, elsewhere and otherwise lawful,

Contra bonos mores.

¹¹⁸ Colville v. Carrick, 1883, 10 R. 1241.

¹¹⁹ Gorman v. Chapman, 7 Ch.D. 271.

¹²⁰ Wickenden v. Webster, 6 E. and B. 387; see Johnstone v. Hall, 2 K. and J. 414.

¹²¹ Reeves v. Cattell, 24 W.R. 485.

¹²² Toleman v. Portbury, L.R. 7 Q.B. 344.

¹²³ Rolls v. Miller, 27 Ch.D. 71.

¹²⁴ Ibid., and cases there.

¹²⁵ Portman v. Home Hospital Lessee, 27 Ch.D. 81, note; Bramwell v. Lacy, 10 Ch.D. 691.

¹²⁶ 27 Ch.D. 85.

¹²⁷ See Woodfall, 665.

¹²⁸ Smith v. White, L.R. 1 Eq. 626 (assignation in full knowledge); and see the law discussed in Ferret v. Hill, 15 C.B. 207.

Nuisance.

may become a nuisance to the neighbourhood; and it is the interest of the landlord to make it plain in the lease that he sanctions no such employment of his property and, if he so desires, to formulate, aggravate, or relax the restrictions which would bind his tenant according to the common or statutory law of nuisance.¹²⁹ The restriction then becomes matter of contract and not merely of implied obligation. Thus a clause which prohibited 'any works than can be reasonably considered as nuisances by the public,' struck at slaughter-houses.¹³⁰ To open a cholera hospital is not 'to carry on a business which may be considered to be nauseous or hurtful or occasion disturbance to the neighbouring feuars.'¹³¹ A prohibition against the erection of 'steam-engines or any other business which may be nauseous,' does not exclude all steam-engines.¹³² Where the condition restrained against 'carrying on any nauseous chemical operations, noxious or noisy manufactures, or anything that may be a nuisance, or may occasion disturbance to any of the neighbouring feuars or proprietors,' the land granted out might nevertheless (on the *ejusdem generis* rule of construction) be used as the site of a hall for cattle shows and cattle sales.¹³³ To use premises as a private lunatic asylum,¹³⁴ or as a licensed victualler's shop,¹³⁵ or as a store for lucifer matches,¹³⁶ is not to carry on in them an 'offensive trade.'

(d) *Setting up a particular Trade.*

Prohibition of particular trades.

In practice, the trades which have been in use to be barred are those of the butcher, the innkeeper, and the licensed victualler. In regard to the first, it has been decided that a prohibition against exercising the trade of a butcher on the premises let is broken by selling raw meat by retail, though no beasts are slaughtered thereon;¹³⁷ and by exposing carcases on the premises though they were cut up, and the contracts for sale of them were made elsewhere.¹³⁸ In regard to innkeepers and victuallers, it has been determined, that an inn or hotel containing sleeping room for the accommodation of the public, and a hydropathic estab-

Butcher.

Inn : public-house.

¹²⁹ See as to Nuisance, Rankine on Landownership, 322, 339; Wood on Nuisance, *passim*.

¹³⁰ Lauder, 16th June 1815, F.C. 450; and see a longer clause with the same result in *Porteous v. Grieve*, 1839, 1 D. 561.

¹³¹ *Mutter v. Fyfe*, 1848, 11 D. 211, 303; see *Metropolitan Asylum v. Hill*, 6 App. Cas. 193.

¹³² *Frame v. Cameron*, 1864, 3 M. 290.

¹³³ *Anderson v. Aberdeen Agric. Hall Co.*, 1879, 6 R. 901.

¹³⁴ *Doe d. Wetherell v. Bird*, 6 C. and P. 195.

¹³⁵ *Jones v. Thorne*, 1 B. and C. 715.

¹³⁶ *Hickman v. Isaacs*, 4 L.T. 285 ('dangerous' omitted).

¹³⁷ *Doe d. Gaskell v. Spry*, 1 B. and A. 617.

¹³⁸ *Doe d. Davis v. Elsam*, Moo. and M. 189.

lishment, though unlicensed, are 'public-houses or taverns;' ¹³⁹ that a place licensed for the sale of liquor to be consumed off the premises, is neither a public-house, nor a beer-house; but is a beer-shop,¹⁴⁰ and its tenant a vintner.¹⁴¹ The *Grangemouth* case,¹⁴² which related to licensed premises and eating-houses, turned on the relation of superior and vassal. Similar questions as to interest to sue, acquiescence in contraventions, and anxiety for the public weal might arise in regard to long leases, scarcely in regard to ordinary leases of town property.

The provisions enacted for the protection of the owners of licensed premises in English Acts,¹⁴³ have no analogue in the Scotch statutes. There are, moreover, no cases turning on conditions in leases of such premises providing for the case of forfeiture of the licence.¹⁴⁴ In England it has been held that there is no implied condition that the lessee will do no act whereby the licence shall be forfeited.¹⁴⁵ An express condition to that effect is not broken by a conviction not endorsed.¹⁴⁶ A licence is not 'imperilled' by the tenant's going to sea.¹⁴⁷ It has been held that where a public-house licence has been substituted for a hotel licence, through no fault of the tenant, but on grounds of public policy, the tenant, who declines to throw up his lease, is not entitled to reduction of rent.¹⁴⁸

(e) *Dealing with particular Persons.*

This species of *quasi*-thirlage is confined in practice ¹⁴⁹ to Brewer's
tenants. retailers of beer who are the tenants of premises belonging to brewers. The condition is that the lessee shall buy the beer he retails from the lessor only. It is a legal condition, though not a favourite of the law;¹⁵⁰ but it can only be enforced if the land-

¹³⁹ *Ewing v. Campbell*, 1877, 5 R. 230; see *Gold v. Holdsworth*, 1870, 8 M. 1006, *infra*, p. 398.

¹⁴⁰ *Pease v. Coats*, L.R. 2 Eq. 688; *L.N.W. Ry. v. Garnett*, L.R. 9 Eq. 26; *St. Albans v. Battersby*, 3 Q.B.D. 359; *London Building Co. v. Field*, 16 Ch.D. 645; *Holt & Co. v. Collyer*, 16 Ch.D. 718; and see *Jones v. Bone*, L.R. 9 Eq. 674; *Fielden v. Slater*, L.R. 7 Eq. 523. The enactment 23 & 24 Vict. c. 27, sect. 44, which relates to this matter does not apply to Scotland (sect. 46).

¹⁴¹ *Wells v. Attenborough*, 24 L.T. 312.

¹⁴² *E. Zetland v. Hislop*, 1881, 8 R. 675, rev. 9 R. (H.L.) 40, 7 App. Cas. 427.

¹⁴³ 35 & 36 Vict. c. 94, sects. 31, 56, 70; 37 & 38 Vict. c. 49, sect. 15.

¹⁴⁴ A form of lease of public-house is

to be found in 1 Jur. Styles, 685.

¹⁴⁵ *Maw v. Hindmarsh*, 28 L.T. 644.

¹⁴⁶ *Wooler v. Knott*, 1 Exch. D. 265.

¹⁴⁷ *Moore v. Robinson*, 48 L.J., Q.D. 156. See as to duty to obtain renewal—*Linder v. Prior*, 8 C. and P. 518.

¹⁴⁸ *Donald v. Leitch*, 1886, 13 R. 790; but see the later case of unavoidable accident—*Muir v. M'Intyre*, 4th Feb. 1887.

¹⁴⁹ But see a case of lessee of lime thirled to certain coal—*Wight v. Dicksons*, 1 Dowl. 141, where the rule of thirlage proper in case of defective accommodation (Ersk. 2.9.37) is followed.

¹⁵⁰ *Jordan*, 1876, 4 R. 1148; cf. *Sunderland Overseers v. Sunderland Guardians*, 18 C.B.N.S. 131; *Wilson v. Hart*, L.R. 1 Ch. 463; *Catt v. Tourle*, L.R. 4 Ch. 654, 659; *Luker v. Dennis*, 7 Ch.D. 227.

lord supplies good marketable beer,¹⁵¹ and (apparently also) such kinds of beer as the tenant requires for his business.¹⁵² The condition is sufficiently implemented if the tenant purchases through an agent of his own the landlord's beer, though without the landlord's knowledge.¹⁵³

IV. *In Mineral Subjects.*

No attempt will be made to detail the multifarious conditions which are inserted in the ample phraseology of a mineral lease. They differ with difference of policy, material wrought, district, and means of transport. Some of the usual clauses have been already discussed.¹⁵⁴ The others are to be found in the ordinary style-books.¹⁵⁵ The terms are usually adjusted by a mining engineer. They relate—shortly stated—to the operations necessary for discovering the strata (if the mine be a new one); to the carrying on of the works in a proper and workmanlike manner; support to prevent subsidence; barriers; periodical surveys; communication of levels; surface damages; position of pits; restrictions as to breaking ground; houses, roads, and railways; indemnification for damages done to third parties; restrictions on mode of working; fences; restoration of surface at waygoing, &c. &c. Those conditions only will now be noticed which have come before the Court. The effect of the Coal and Metalliferous Mines Acts of 1872,¹⁵⁶ and the laws which regulate the rights and obligations of the persons interested in mining must be sought in the statutes and in treatises which deal specially with this extensive subject.¹⁵⁷

1. *As to Mode of Working.*

Working.

To increase the breadth of a quarry may be proved to be an infringement of a general condition to work 'regularly and to the dip of the stone.'¹⁵⁸ Where a pottery was let with adjoining land, and with a privilege of digging clay therein for the purposes of the pottery, the lessee had no right to manufacture bricks for sale, or except in so far as required for the use of the

¹⁵¹ Luker, *supra*,¹⁵⁰ and cases there.

¹⁵² Edwick v. Hawkes, 18 Ch.D. 199.

¹⁵³ Ibid. The beer was of a better sort than what the landlord supplied to persons in the trade. See the effect in a sale of the consequent diminution in value—Jones v. Edney, 3 Camp. 285; and of transference of the brewer's business—Doe d. Calvert v. Reid, 10 B. and C. 849.

¹⁵⁴ Assignment and sublease, *supra*, p. 163; warrantice, p. 209; rent, p. 277; fixtures, p. 271.

¹⁵⁵ A good selection is given in 1 Jur. Styles, 605 *seq.*; see also 2 Hunter, 616; 2 Bell, Leases, 260.

¹⁵⁶ 35 & 36 Vict. cc. 76, 77, and later Acts; 38 & 39 Vict. c. 39; 44 & 45 Vict. c. 26; 45 & 46 Vict. c. 3.

¹⁵⁷ Bainbridge on Mines; Rogers (*do.*); Macswinney (*do.*); and see Rankine, Landownership, *sub voce*, Mines: Support: Water.

¹⁵⁸ Ferguson v. Galloway, 1821, 1 S 11 (N.E. 8).

pottery, and at the end of the lease he was not entitled to remove bricks made of that clay without paying the landlord the value of the raw material.¹⁵⁹ And where a coal lease was granted with ample powers of sinking pits, erecting engines, &c., but without express power of charring, it was ruled that the power could not be implied.¹⁶⁰ A lease of all and whole the coal within a barony, excepting the coal lying within the parks, gardens, and enclosures of the barony, unless the consent of the proprietor were obtained, was read by help of the last-cited words, as a lease of the whole coal, the reservation being merely for the preservation of amenity, and not entitling the proprietor himself to work the coal in the reserved space.¹⁶¹ A stipulation that if any other pit should be required than two already in part sunk, the tenant should have power to sink another pit or pits, but only in such situations as should have been previously approved of in writing by the proprietor, did not entitle the proprietor to refuse approval arbitrarily and without reasonable cause.¹⁶² Mode of working.

2. *Surface Damages.*

In a mineral lease the lessee was prohibited from sinking pits or making any surface operations in fields adjoining to the mansion-house of the estate. He had unrestricted power to work the minerals on every other part of the estate, but on condition of paying 'all surface damages whatever occasioned by these operations.' In working the minerals in the direction of the mansion-house the underground operations occasioned a sit, by which the stability of certain offices was affected. An engine was erected at the mouth of the pit, but beyond the specified limits. The smoke and ashes from that engine rendered unfit for use a washing-house, bleaching-green, and laundry, adjoining the mansion-house. It was held that surface damages comprehended damages occasioned by underground as well as by surface operations; that injury to buildings by a sit gave a relevant claim for surface damages under the lease; but that injury to the use of the bleaching-green, washing-house, and laundry by the smoke and ashes of an engine did not give a relevant claim for surface damage; and it was observed¹⁶³ that such injury was of the nature of injury to the amenity of the mansion-house, which could be protected only by a special provision.¹⁶⁴ Where a Surface damages.

¹⁵⁹ *Gordon v. Suttie*, 1837, 15 S. 549.

¹⁶⁰ *Herriot v. Faulds*, 1804, M. 15255.

¹⁶¹ *E. Wemyss v. Hope*, 1796, 3 Pat.

¹⁶² *Montgomerie v. Carrick*, 1848, 10 D. 1387.

¹⁶³ *Per* L.P. M'Neill and L. Robertson.

¹⁶⁴ *Oswald v. Gordon*, 1853, 16 D. 70.

mineral lease provided for payment of 'damages that should be done to the surface or grounds or buildings thereon,' and taxed the amount (after the termination of certain agricultural leases) at so many shillings per acre, over and above the damage to buildings, which was to be fixed by arbitration, it was held that the provision applied only to proper surface damage (*i.e.*, 'damage that prevented the ordinary agricultural use of the subjects') and damage to buildings by subsidence or in some such way; and not to damage from smoke, affecting the amenity of a mansion-house and injuring the trees and garden.¹⁶⁵ A lease provided that the underground workings should not be carried nearer to the mansion-house than 100 yards, to the offices or garden than thirty yards, or to the steadings than twenty yards. It was held that the outside line of buildings was the foundation wall, though it extended beyond the wall as seen above ground, and the outside of the main-door step; that a kitchen, court, and offices formed part of the mansion-house; that the garden did not include a strip of border-ground and line of trees outside of its wall; and that a dovecot and pond were not 'offices.'¹⁶⁶ By the terms of a lease of ironstone and ore, the lessees were bound to pay all surface damages which might be sustained by the agricultural tenant or by the proprietor by and through their working. Before the natural expiry, the mineral lease terminated in virtue of a clause in it to the effect that the lessees might abandon when the mines became unworkable to profit. Permanent damage had been caused by the workings. It was held to be clear that the lessees were liable in damages to the proprietor, notwithstanding annual settlements they had made with the tenant; for there was a diminution *in perpetuum* of the value of the property, and reparation to the landlord thus accruing was contemplated in the lease.¹⁶⁷

Obligation to
pay surface
damages.
Construction.

3. *Communication of Levels.*

A lease of coal contained a stipulation that in case it should be found necessary to communicate the level of the coal so let to any neighbouring proprietor, it should only be done with the advice and consent of both parties. The interest of the landlord was to prevent the descent of water into his strata, there being the further risk of the lower part of the level being stopped by the heritor to the dip. The express terms of the agreement were enforced by the House of Lords, and a communication having

Communica-
tion of levels.

¹⁶⁵ Galbraith's Tr. v. Eglinton Iron Co., 1868, 7 M. 167. 6 M. 925; alt. 9 M. (H.L.) 180.

¹⁶⁷ Ogilvy v. Devon Iron Co., 1845, 8 D. 241.

¹⁶⁶ Russel & Son v. Gillespie, 1868,

been made into a neighbouring field also let to the tenant without the requisite consent, the tenant was ordered to shut it up and pay for the benefit he had enjoyed by the use of it.¹⁶⁸ So, if there be no permission to communicate levels, it has been held that the lessee of two adjacent coal-fields belonging to different owners is not entitled to communicate the drain or level of the one field to the other.¹⁶⁹ Nor can a lessee use levels of mines let to him for the benefit of mines which are his own property, except by agreement. A long lease of coal was granted, with an exclusive right to the levels necessary for working 'so far as in the lessor's lands or belonging to him.' Under this agreement the lessee carried a certain level through coal-fields of his own, situated between the coal-fields thus leased to him. Another agreement was entered into, by which the lessor ratified the communication of the level thus made, and the lessee bound himself to pay therefor in name of compensation such a sum as should be awarded by arbiters. In a suit by the lessor for implement, he maintained that the lessee had no right to use the level of the lower coal-field let except for working the coal let, and that his right to communicate the level was constituted solely by the second agreement, and therefore that he should pay the true value of such communication. The counter-plea was, that as the lessee had a right to use the level of the one field let for the coal of the other, and as he could not do so without the communication through his own intervening coal, he was entitled to carry forward the level without giving a consideration. The Court held that he was not so entitled, and that the agreement must govern.¹⁷⁰ Subsequently, the Court in determining the grounds for estimating the value of the communication of the use of the level, took into consideration not only the facilities afforded for drainage by the possession of an alternative level, but also the porous nature of the strata in the tenant's own field, in so far as it might have drained imperceptibly into the communicated level.¹⁷¹ These judgments were affirmed on appeal.¹⁷² There being a clause in a coal lease by which it was agreed that either party was to have the power of communicating the level of the coal to any neighbouring coal-works, the power did not expire with the lease, but continued to be operative so long as the tenant continued to have a right and

¹⁶⁸ *Wauchope v. Hope*, 1773, 2 Pat. 286; 1774, 2 Pat. 338.

¹⁶⁹ *E. Wemyss v. Hope's Trs.*, 7th Feb. 1809, F.C. 161.

¹⁷⁰ *Halkett v. E. Elgin*, 1826, 5 S. 154 (N.E. 140) *seq.*, 9 S. 412.

¹⁷¹ 1832, 11 S. 203, 315.

¹⁷² 1835, 1 S. and M.L. 629.

Roads.

interest in neighbouring coal-works, and, 'neighbouring' did not merely mean immediately adjacent.¹⁷³ Similarly, a right to use roads on the landlord's estate to convey minerals from another estate beyond it does not belong to the tenant except through special stipulation.¹⁷⁴

4. *Barriers.*

Barriers.

In regard to the liability of a lessee to leave a barrier to the rise, it is settled that he is only entitled to exhaust the mineral under the qualification that he so conducts his operations as to leave a barrier against the water of the adjacent mineral.¹⁷⁵ But the tenant may be released from this liability either expressly, or by plain implication, which will be gathered, for instance, from a combination of such facts as that the lease granted out the whole coal, provided for communication with other mineral fields, and contained no continuing obligation to pump.¹⁷⁶

5. *Support.*

Pillars or supports.

The lessee is under implied obligation to leave a part of the mineral for sufficient pillars to support the roof of the mine.¹⁷⁷ The law of support is illustrated in three Scottish cases between landlord and tenant. The proprietor of a coal-field conveyed to a company of alum manufacturers, for a period of sixty-three years, the whole ore in his coal-pits and coal-wastes from which alum could be manufactured. The alum seam lay immediately above the coal seam. The coal-field was let to tenants, who were authorised to work the coal in a fair and regular manner, but so as not to injure the interests of the alum company. The coal was wrought by 'stoop and room.' It was held that the alum company were entitled throughout the duration of the contract to prevent the landlord or his tenant of the coal from removing the pillars, in so far as necessary to support the roof, although all the solid coal should be wrought out.¹⁷⁸ Where a mineral lease obliged the tenant to work the minerals in a workmanlike manner, but empowered him to work the coal 'either by stoop and room or longwall manner, or otherwise as he should find it for his advantage;' it was observed that there was nothing in

¹⁷³ *E. Abercorn v. Wallace*, 1764, 6 Pat. 757.

¹⁷⁴ *Mungle v. Young*, 1869, 6 Sc.L.R. 217.

¹⁷⁵ *E. Wemyss v. Hope's Trs.*, 7th Feb. 1809, F.C. 161; *Wark v. Bargaddie Coal Co.*, 1856, 18 D. 772, rev. 3 Macq. 467, *supra*, p. 99.

¹⁷⁶ *Crawford v. Dixon*, 1824, 2 S. 667

(N.E. 560); aff. 2 W. and S. 354. See as to the custom, the engineer's report.

¹⁷⁷ *E. of Wemyss v. Hope's Trs.*, *supra*, 175; *Davis v. Treharne*, 6 App. Cas. 460. See the law relating to support treated in Rankine, *Landownership*, chap. xxviii.

¹⁷⁸ *Hurlet Alum Co. v. E. of Glasgow*, 1850, 12 D. 704, aff. 7 Bell's App. 100.

the lease itself, apart from evidence of the nature of the seams, to prevent the tenant from causing subsidence of the superincumbent strata.¹⁷⁹ Again, the tenants under a mineral lease pumped out the water preparatory to working the minerals, thereby causing a sit of the ground, and consequent injury to buildings on the surface. The mineral lease did not stipulate that the tenants should take precautions to prevent the emergence of such an injury. It was held that the party who withdraws a natural support, or the artificial support which has come in place of the natural one, does so at his peril.¹⁸⁰ Where a lease of a particular mineral existing in one and the same mine along with other minerals gives the tenant a right of working it in the way most profitable and convenient for him, he is not restrained from working in the way he thinks most beneficial by the circumstance that such way of working will prejudice the interest of the tenant of the other minerals in a lease entered into subsequently to his.¹⁸¹

Leases of different minerals in the same mine.

6. *Miners' Cottages.*

A landlord let to the same tenant the minerals under a farm, and also, by a separate lease, the surface of the land. The mineral lease expired some years previous to the agricultural lease. During the currency of both leases the lessee erected certain buildings and houses, which had been chiefly occupied by colliers, or used for the purpose of working the minerals. The mineral lease conferred no power on the tenant to erect such buildings, and the agricultural lease reserved no power either to the landlord or to the mineral tenant to erect them. On expiration of the mineral lease it was held that the landlord was not entitled summarily to eject the tenant from these buildings; but action was reserved to him to compel the tenant to remove from such of them as could be shown fairly to fall within the operation of the mineral lease. A mineral lease does not necessarily imply a right to erect miner's houses on the lands.¹⁸²

Houses for miners.

7. *Restoration of Ground.*

A canal was formed by the tenant of a coal-work through the grounds of a neighbouring proprietor, to whom rent was paid for the ground so occupied. The mineral lease having expired, the proprietor of the coal-work possessed the canal and paid rent

Restoration of ground.

¹⁷⁹ *Muirhead v. Tennant & Co.*, 1854, 16 D. 1106 (*sed quære*, see *Davis v. Treharne*, *supra*, 177). The decision turned on the nature of certain exceptions to the charge to the jury.

¹⁸⁰ *Bald's Trs. v. Alloa Colliery Co.*, 1854, 16 D. 870. As to the respective

liability of landlord and tenant for damage to houses by sits caused by a mineral tenant, see *Hamilton v. Turner, &c.*, 1867, 5 M. 1086; *Rankine, Landownership*, p. 409.

¹⁸¹ *Hurlet case*, *supra*, 178.

¹⁸² *Oswald v. Pearson*, 1858, 20 D. 440.

until decerned to remove and found liable for violent profits in an action which did not conclude for decerniture to have the ground levelled or put in an arable condition. After this decree the proprietor of the coal-work and his successor continued to occupy the canal for several years, and paid as rent the sum fixed as due for violent profits. It was held that (whatever might have been the obligation of the tenant) the proprietor was not bound on ceding possession to level the ground to make it fit for agricultural purposes.¹⁸³

V. *In Fisheries, and Shootings : Mills.*

The mode of conducting fisheries is in great part prescribed for landlords, tenants, and the public by statute.¹⁸⁴ The conditions which are usually inserted in leases of fishings are—to work, fish, and clean the whole waters sufficiently, and to keep the premises in order and repair, including the fishermen's houses.¹⁸⁵

The clauses of a shooting lease are treated of in another place.¹⁸⁶

The clauses of leases of mills and factories relate more to repairs,¹⁸⁷ and the letting of the machinery,¹⁸⁸ than to management.

B. REMEDIES.

1. *Action of Damages.*

Wherever there has been breach of contract (in the ordinary and legal sense of the word) an action of damages lies ; and breach of the contract of lease forms no exception to this rule, which might be illustrated almost at random from any part of the present book. It is proper, however, to notice (a) a plea in defence which owes its special significance to the circumstance that a lease is a continuing contract, not prestable by a single act, and (b) the mode in which damages have been measured.

(a) *Acquiescence.*

It may be a fair and the only fair inference from the circumstances of a case, that either party has passed from claims which would otherwise have been competent to him. The question is in every case one of fact. It is possible to illustrate : it is impossible to lay down any general rule, except that which is of

¹⁸³ *Steuart v. D. of Argyle*, 1857, 19 D. 1076. For special cases on interpretation of terms of leases, &c., of minerals, see *Wight v. Dicksons*, 1813, 1 Dow 141 (obligation to furnish coal to limework); *Cunningham v. Warner*, 1823, 3 S. 246 (N.E. 215), rev. 2 S. App. 225 (partnership); *Young v. Cunningham*, 1832, 8

S. 959, 10 S. 502 (encroachment).

¹⁸⁴ *Stewart on Fishing ; Rankine, Landownership*, 257, 350, 765, 875.

¹⁸⁵ 1 Jur. Styles, 695 (salmon-fishings).

¹⁸⁶ Chap. xviii.

¹⁸⁷ *Supra*, p. 220.

¹⁸⁸ *Supra*, p. 254.

the essence of the plea—that the facts must be sufficient to instruct consent to infringement of the contract ;¹⁸⁹ and that the pursuer must show that he had required the defender or his author to fulfil the obligation, at least where both parties are to take part in the implement.¹⁹⁰

Where the plea has been adduced by a tenant in answer to his landlord's claim, the case has usually been one of miscropping. Thus, thirteen years after the commencement of a tack which (with renewal) had a duration of thirty-five years, the lessor's representatives complained that from entry onwards the tenant had miscropped and mislaboured the land contrary to the stipulations of the lease. The landlord's factor was frequently on the farm for the first eleven years, and the landlord lived hard by during part of that time. The renewal contained the same stipulations. No complaint was made of the tenant's conduct. It was held that acquiescence in deviations from rotation and from the prescribed proportion in crop was made out, and that no damages were due except for actual exhaustion of the land. A report was ordered as to the mode of bringing the land back into proper condition, and the landlord's right thereafter to insist on the conditions of the lease being fulfilled was reserved.¹⁹¹ In entire consistency with this, it was held that where a purchaser allowed a lease which ran out at the date of his purchase to be continued for two years by tacit relocation, he was not barred by the alleged acquiescence of the vendor in gross miscropping from claiming damages for a continuance thereof during that period, though he accepted payment of the rent without reserving any claim. In instructing the fact of mismanagement it was competent to go back to the state of the farm in the vendor's time.¹⁹² The claim for damages, in so far as not barred for the past and future, may be met by an offer to put the land in heart during the currency of the lease, if, on account of its not being near its termination, the possibility of doing so is not merely matter of doubtful experiment, but certain ;¹⁹³ not otherwise.¹⁹⁴

The converse plea by the landlord against his tenant's suit for damages has arisen in regard to the non-implement of various

In miscropping.

Short quantity.

¹⁸⁹ See as to the necessary averments, *Hunter v. Broadwood*, 1854, 16 D. 441, *infra*, p. 399 ; and as to the right of a purchaser, *Carnegie v. Guthrie*, 1866, 5 M. 253, *infra*, p. 409.

¹⁹⁰ *Reay v. Chalmers*, 1834, 12 S. 360.

¹⁹¹ *Murray's Trs. v. Gordon*, 1806, M. App. Tack, 12, Hume 823.

¹⁹² *Hall v. McGill*, 1847, 9 D. 1557 (Hunter's note (ii. 503) seems erroneous). See in contrast, *Baird v. Mount*, 1874, 1 R. 1119.

¹⁹³ *Murray's Trs.*, *supra*, ¹⁹⁰.

¹⁹⁴ *Carron Co. v. Donaldson*, 1858, 20 D. 681 (4 years from ish).

Damage by
game.

obligations incumbent on the landlord.¹⁹⁵ Thus, where a tenant on the expiry of his lease possessed the farm on tacit relocation for five years during the whole of which he possessed forty acres of moor less than during the lease (this parcel of land having been revindicated by a neighbouring proprietor), all claim for damages was held to be barred by his continuing to possess and pay the full rent at a time when he was at full liberty to remove. 'There was no tacit relocation of a claim of damages.'¹⁹⁶ A tenant at the expiry of his lease brought an action of damages against his landlord for injury to crops for the last seven years from excess of game. He stated that each year, when he paid his rent, he claimed a deduction on that ground and that the landlord, while admitting the excess of game, attributed the loss to other causes and allowed no deduction. An issue was refused (except as to the last year's loss, for which claim was reserved in the receipt for rent) on the ground that a tenant, at the conclusion of his lease is not entitled to go back, for the whole or any part of it and claim damages for injury done during his tenure, after paying rent without any effective demur, such as to put the landlord on his guard to abate the injury.¹⁹⁷ Entailed land was let in 1864. There were changes of owner in 1866 and 1873. The lease reserved to the landlord power 'to conduct all water-courses and 'drains on levels necessary for making the same or for the drainage of the said estates' on paying surface damages. Drainage operations on another part of the estate to the rise in 1867 and 1877 flooded the farm drains which were not large enough, or so constructed as, to carry off this surplus water. Complaint was first made by the tenant in 1877. Thereafter a correspondence on the subject went on for two years and was resumed two years later. It was held that the heir in possession was not liable for damage done either before his entry in 1873 or before complaint was made, but that he was liable for damage done thereafter (1878-81), notwithstanding that the full rent had been paid for these years without reservation, since he had been fully certiorated by the correspondence that the claim was to be insisted in.¹⁹⁸ The circumstances are in strong contrast to

¹⁹⁵ See *Clugston v. Goold*, 1823, 2 S. 308 (N.E. 271); *Lamb v. Mitchell's Trs.*, 1883, 10 R. 640, *infra*, p. 400.

¹⁹⁶ *Baird v. Graham*, 1852, 14 D. 615.

¹⁹⁷ *Broadwood v. Hunter*, 1855, 17 D. 340; form of issue, 17 D. 1139. The case is narrow but the decision seems to be justified by the fact that the com-

plaints were merely verbal grumbles, except in one instance when the demand broke down. Contrast *Hardie v. D. Hamilton*, 1878, 15 S.L.R. 329.

¹⁹⁸ *Macdonald v. Johnstone*, 1883, 10 R. 959; cf. *Barclay v. G.N. of Scotland Ry.*, 1882, 10 R. 144 (acquiescence in breach of statutory obligation on Railway Co.).

those of the foregoing case, but the same rules are applied in both.

(b) *Measure of Damages.*

There is little authority in Scotch law regarding the measure of damages; and less still is afforded by cases between landlord and tenant. It has been too much the way in this country to ignore rules in respect to a matter which is really a jury question, though determined usually now-a-days by a Judge, as part of the whole question submitted to him on a closed record.¹⁹⁹ The following cases may, however, be noted. In a case of eviction of a whole holding, it has been laid down that in proving the loss sustained by agricultural tenants deprived of their farms, where there was no fault in those liable, three modes of valuation have been adopted—by stating the estimated produce and the price at which it would have sold during the past years, and at which it would probably sell during the future years of the lease, and then deducting the expense of cultivation; or by stating the rent which a sublessee would have given; or by proving the rent paid under new leases, and putting a value upon additional conditions contained in them. In applying these modes so as to prove *quantum*, the Court directed (1st) That where the tenant remained on the farm, the difference of rent under the old and new leases, with an allowance for the difference of the conditions, was probably the best rule. (2nd) That where the tenant was removed from the farm, whether the jury took the new rent or the estimated subrent, they must give what they thought a reasonable sum as tenant's profit; and that this profit should be given, not for the whole years of the lease, but for such a time as they thought necessary to enable the tenant to get another farm. (3rd) That if the jury took the estimated produce, such profit was included in it. (4th) That where the farm had been sublet before the reduction, the subrent was the sum to be given. (5th) That where the stock was sold, the jury must give what they thought was proved as the difference between the sum for which it was sold and that for which it would probably have sold at the end of the lease. And (6th) That there must have been some disturbance of the possession during the dependence of the reduction, the claim upon which ground was of the nature of *solatium*.²⁰⁰

¹⁹⁹ See *Crawford v. Dickson*, 1824, 2 S. 667 (N.E. 560), aff. 2 W. and S. 354; *Monro v. M'Kenzie*, 1823, 2 S. 593 (N.E. 568); *Hunter v. D. Queensberry's Exr.*,

1827, 5 S. 678; and *Bell v. Henderson*, 1822, 1 S. 353 (N.E. 331); 31 & 32 Vict. c. 100, sect. 27; *Mackay's Practice*, i. 35.

²⁰⁰ *Dalziel v. D. Queensberry's Exr.*,

Miscropping. The measure of the damage done by miscropping, infringement of rotation, and the like, would appear to be the sum required to put the farm into the condition in which it ought to have been kept or left.²⁰¹

Mineral lease. Damages having been found due by mineral tenants for retaining possession, on an erroneous view of their contract, after intimation to them by their landlord that he desired to resume possession, as he was entitled to do in virtue of special agreement, it was held : (1st) that a reasonable time to remove had to be allowed them, and (2nd) that the landlord was entitled to be placed in as nearly as possible the same position in regard to profits as he would have been in if there had been no breach of contract. So that the profits which resulted, or might fairly be held to have resulted, from the tenant's operations during the period of wrongful possession and the loss of an expected increment of lordship under a new lease were both to be taken into consideration ; and allowance had to be made for tear and wear, for interest on cost of machinery, estimated generally, not precisely ; but not depreciation in its market value.²⁰²

2. *Summary Application for Inspection. Miscellaneous Remedies.*

Inspection. It has already been shown that in order to preserve evidence of the state of repair of houses and fences,²⁰³ or in order to found an application for damages, a summary application for an inspection by a man of skill is competent. The same is true where land let is being miscropped or otherwise mismanaged. The reporter is ordered to advise as to the mode of restoring the land into proper condition ; and the landlord obtains, if necessary, authority to enter and cultivate at the tenant's cost.²⁰⁴ Thus, where a tenant had by the middle of April made no preparation for laying down the crop, a report was ordered, and the owner was thereafter authorised to cultivate according to the recommendations therein contained.²⁰⁵ But the application must be made timeously. Therefore, where six months elapsed after the tenant had (between terms) ceded possession before an application was made for an inspection of the turnip fields, with regard to their being insufficiently cleaned and weeded, the delay was fatal.²⁰⁶

1825, 4 Mur. 10, 25. The damage must be direct, not consequential—Roberts v. E. Rosebery, 1825, 4 Mur. 1.

²⁰¹ Fraser v. Macdonald, 1834, 12 S. 684.

²⁰² Houldsworth v. Brand's Trs., 1877, 4 R. 369. As to loss of profits see Douglas v. Walker, 1825, 3 S. 534 (N.E.

370); Watson v. Kidston & Co., 1839, 1 D. 1254.

²⁰³ *Supra*, p. 226, and esp. Gordon's Trs. v. Melrose, 1870, 8 M. 906, and cases there.

²⁰⁴ Lees, Styles, 183.

²⁰⁵ Brock v. Buchanan, 1851, 13 D. 1069

²⁰⁶ Baird v. Mount, 1874, 1 R. 1119.

As a part of such summary applications, there may be a claim for damages.²⁰⁷ It is dependent on the rest of the petition, and stands or falls with it.²⁰⁸

There is no noticeable peculiarity in the use of interdict or Interdict. suspension and interdict, as a preventive remedy in case of threatened or continuing infringements of a lease.²⁰⁹

Where a litigation is in dependence as to a tenant's title, an Interim manager may be appointed.²¹⁰ If the dispute be as to management, an inspection and interim order to repair, &c., Repair. are granted, as where an action of declarator was in Court to determine the obligations of the tenants regarding the maintenance of levels, and the levels were going out of order and were in danger of being destroyed and of injuring the mines.²¹¹ Liability to repair the consequences of a breach of a Caution. condition in a lease may likewise be enforced by an order to find caution.²¹² The question how far summary diligence is competent has been already considered.²¹³ Rescission of the contract is a Rescission. competent remedy, where the breach is persisted in notwithstanding complaint and the contravener maintains his right and intimates his intention so to persist.²¹⁴ Remedies by way of Irritancy. irritancy are deferred to that part of this work which deals with the termination of a lease.²¹⁵

3. *Interest ; Penalty ; and additional Rent.*

It is the usual if not universal practice to insert before the registration clause of a formal lease a clause of implement or implement. mutual performance²¹⁶ in these terms : ' And both parties bind ' and oblige themselves and their respective foresaids to implement and fulfil their respective parts of the premises to each ' other under the penalty of £ sterling, to be paid by the ' party failing to the party performing or willing to perform, over ' and above performance.'²¹⁷ Rent is usually stipulated to be paid ' with a fifth part more of each term's payment of liquidate ' penalty in case of failure in the punctual payment thereof and Penalty.

²⁰⁷ A.S., 10th July 1839, sect. 138 ;
Fraser v. Macdonald, 1834, 12 S. 684 ;
Hall v. M'Gill, 1847, 9 D. 1557.

²⁰⁸ Baird, *supra*,²⁰⁶

²⁰⁹ See Fraser v. Macdonald, *supra*,
²⁰⁷

²¹⁰ Affleck v. Affleck, 1862, 24 D. 291.

²¹¹ E. Hopetoun v. Borron, 1859, 21 D.

²¹² 218 (expenses reserved to abide event).

²¹³ Strachan v. Nichol, 1828, 7 S. 20
(though granted of consent, the rule
seems general).

²¹³ *Supra*, p. 316 ; Hendry v. Marshall,
1878, 5 R. 687.

²¹⁴ Davie v. Stark, 1876, 3 R. 1114.

²¹⁵ Chap. xx.

²¹⁶ In aid of the common law obligation incumbent on both parties, if the contract be complete ; see Sproul v. Wilson, 1809, Hume 920 ; Thomson v. Fowler, 1869, 21 D. 453.

²¹⁷ Leases in Jur. Styles, i. 579 *et seq.*

Interest on
improvement
outlay.

Annual
penalty or
additional
(pactional)
rent.

' the interest of each termly payment at the rate of 5 per centum per annum, from the respective terms of payment during the ' not payment.' ²¹⁸ Further, interest is usually stipulated for on money laid out on improvements, by binding the tenant (besides performing the carriages) to ' pay interest on the sums so expended at the rate of 5 per centum per annum from the time ' when the same shall have been expended during the currency ' of this lease.' ²¹⁹ Lastly, it is usual to append to special conditions or regulations relating to management, a clause such as this : ' And the tenant binds himself and his foresaids in case he ' or they shall act contrary to, or fail to fulfil, any of the preceding obligations, to pay to the proprietor £ of additional ' rent [or, under the penalty of £] yearly for each and every ' acre that shall be cultivated or treated in a different manner ' from the plan of management above described.' If the sum so stipulated for be called ' additional rent,' the addendum is sometimes appended: ' which additional rent shall not be held a penal ' liability but a pactional rent.' And in every case the sum is made payable ' over and above and along with the rent in the ' year or years in which such deviation shall take place.' ²²⁰ This last sort of penalty (or additional rent) is in practice confined to agricultural leases. ²²¹

(a) *Interest.*

Whether in default of payment of rent or of the performance of any other continuing pecuniary obligation interest be due *ex lege*, and, if due, whether from the date of default or of demand has not been expressly determined. The rule is that interest ' is ' not due *sine pacto*, but may be made good by the Lords, their ' modification of damages and expenses ; ' ²²² and among the many exceptions noticed by our writers, ²²³ in which interest is due *ex lege* from the date at which the debt becomes due, no mention is made of arrears of rents. There is also the analogy of feuduties and ground-annuals. The understanding of the profession has been in conformity with this omission. ²²⁴ And there is some support for this understanding in a decision which was special in this respect, that the rent was payable not in money but in

²¹⁸ Ibid., pp. 576 *et seq.*

²¹⁹ Ibid., pp. 577, 585 *et seq.*

²²⁰ Ibid., pp. 578 *et seq.*

²²¹ Additional rent is sometimes reserved in mineral leases where additional facilities (access to and by railway, &c.,) accrue during a lease ; but that is a different sort of stipulation. See *ibid.*, pp.

644, 645.

²²² St. 1.13.10.

²²³ Bankt. 1.21.6-9 ; Ersk. 3.3.77-80, 82 ; 2 B.C. 647-9 ; B. Pr. 32.

²²⁴ Arg. in *Dawson v. Pringle*, 1802, M. App. Annualrent, 5 ; L. Glenlee in *L. Dundas v. Moncrieff*, 24th Nov. 1835, F.C. p. 42.

kind.²²⁵ It has never been decided whether interest runs from the date of a formal extrajudicial demand or from the date of citation in an action or of a charge for payment. The latter is probably the sounder view looking to the analogy of interest on feu-duties.²²⁶ If—as ought always to be the case—interest on arrears is stipulated for and a dispute arises as to the amount of rent payable at any time, the tenant ought to consign the amount demanded or pay it to account; for, if not, the existence of a dispute will not prevent interest from running on.²²⁷ But the landlord may be barred from demanding interest (though stipulated for) by conforming to a practice in the district of postponing actual receipt or by irregularities in the time and mode of settling accounts.²²⁸

(b) *Additional (Pactional) Rent and Penalty.*²²⁹

Additional or pactional rent is the form of liquidated damages which is usually adopted in leases.²³⁰ The cardinal difference between these two modes of enforcing covenants is that a penalty may be modified by the Court so as to be equivalent to the actual damage done through breach, and no more;²³¹ while liquidated damages are not subject to modification, being the precise liability which the parties themselves have agreed on as following on the adoption of a particular course²³²—‘the conventional value of the different use and possession which the tenant ‘may derive from the farm.’²³³ It is not rent in the only proper sense, since it does not infer a right on the part of the deviator to set up or continue deviations, unless there be an express condition to that effect—the lease containing a licence to deviate on terms.²³⁴ In other words, it is not as a rule optional to the tenant to deviate from regulations on paying the pactional rent, which to this extent resembles a penalty. So that it is competent to obtain an interdict against further deviations while exacting the pactional rent for the past.²³⁵ Thus in a case, not of a farm

²²⁵ *Dundas v. Moncrieff*, *supra*, ²²⁴.

²²⁶ Cf. *More's Notes*, 78, with *Ms. Tweeddale v. Aytoun*, 1842, 4 D. 862.

²²⁷ *Graham v. Moir*, 1821, 1 S. 16 (N.E. 14).

²²⁸ *M'Leod v. M'Leod*, 1799, *Hume* 800.

²²⁹ St. 1.10.14; *Kames, Equity*, 352; B. Pr. 34, 149, 1221; 1 B.C. 655; 1 Bell, *Leases*, 253, note; 1 Bell, *Conv.* 254. The English cases (collected in *Woodfall*, 390) agree in the main with the Scotch, and are very instructive.

²³⁰ *Per* L. Gifford in *Baird v. Mount*,

1874, 2 R. 101.

²³¹ St. 1.10.14; *Kames, Equity*, 352.

²³² *Skeen*, 1637, M. 8401, 10037; *Johnston v. Forbes*, 1639, M. 10037,—taking the place of damages and caution, Bankt. 2.9.21.

²³³ B. Pr. 1221; and see *Ivory's Note to Ersk.* 2.6.39; *Brodie's Note* (4) to St. 2.9.43.

²³⁴ *Stratton v. Graham*, 1789, 3 Pat. 119.

²³⁵ *M'Kenzie v. Craigies*, 18th June 1811, F.C. 304, aff. 6 Pat. 117; *M'Kenzie v. Gilchrist*, 13th Dec. 1811, F.C. 419; cf.

(as is usual), but of a building-stance, a prohibition against keeping a public-house or selling liquor on the ground without a special yearly licence from the landlord, 'otherways to pay £10 sterling of additional rent for each time they (the tenants) shall be found guilty,' was held to be an absolute prohibition, and the tenants were not entitled to the option of contravening it on paying the additional rent.²³⁶

Pactional
rent not
modified.

The rule that a pactional rent will not be modified is well settled. Wherever the tenant has not an express option, interdict against contravention of regulations (if threatened) will be granted; and additional rent for past deviations, and interdict against future deviations will be decerned for. Thus, where £5 of additional rent was payable for each acre mislaboured contrary to the terms of the lease, the tenant was held liable for £75 for having fifteen acres less of green crop in the last year than he ought to have had.²³⁷ Similar results followed in a case of overploughing,²³⁸ and in later cases of miscropping.²³⁹ The actual annual value of the land mismanaged or the damage actually done through mismanagement cannot be relevantly put in evidence.²⁴⁰ A smaller sum per acre is sometimes named as additional rent in the earlier, and a larger sum in the closing years of the lease;²⁴¹ or the additional rent may only be stipulated for in regard to the closing years,²⁴² or only as to part (the arable part) of the land.²⁴³ Where (as is common) additional rent was declared not to be penal but pactional, and the lessee had deviated not only from the sett prescribed in the lease, but also from another substituted in conformity with his own suggestions, full additional rent was found due by him, since all the other conditions remained unaltered and equally applicable to the new rotation.²⁴⁴ If, on the other hand, the new rotation involves what would otherwise have been a contravention of regulations, the landlord must be held as consenting to this as a necessary part of the new system.²⁴⁵ The

Cross v. Muirhead, 1813, Hume 860; Campbell v. M'Laurin, 1814, Hume 864.

²³⁶ Gold v. Houldsworth, 1870, 8 M. 1006; see a very special case of alteration in the ish—Gillanders v. Craig, 1856, 19 D. 116.

²³⁷ Little v. Mutter, 1797, Hume 797, and M. in note to Maxwell, *infra*,²³⁹

²³⁸ Pollock v. Paton, 1777, M. App. Tack, 4, Hailes 766, 5 B.S. 517.

²³⁹ Stratton v. Graham, *supra*,²³⁴; Henderson v. Maxwell, 1802, M. 10054.

²⁴⁰ *Ibid.*

²⁴¹ Lawson v. Ogilvie, 1832, 10 S. 531, aff. 7 W. and S. 397.

²⁴² Miller v. L. Gwydir, 1824, 3 S. 65 (N.E. 42), aff. 2 W. and S. 52; see interpretation of an ambiguous clause of this sort—Suttie v. Somner, 1828, 6 S. 1122.

²⁴³ Thriepland v. Munro, 1861, 23 D. 1252 (land under cultivation).

²⁴⁴ Morrison v. Blair, 1823, 2 S. 241 (N.E. 212).

²⁴⁵ Taylor v. Duff's Trs., 1869, 7 M. 351, *infra*,²⁵²; *per* L.P. Inglis in Lamb v. Mitchell's Trs., 1883, 10 R. 640, 645.

additional rent has no relation to anything which has been done in pursuance of a permission or licence not contained in the lease, however wrongful. Thus liability for additional rent was not, though liability for damages was, incurred by an incoming tenant, who, having got access to the farm before entry to sow grass seeds, sowed seeds other than those prescribed.²⁴⁶

The consequences of the enforcement of a stringent obligation to pay pactional rent—far beyond, it may be, the actual damage done—may be so penal, that the Court is not slow to give effect to a plea of consent or abandonment, when sufficiently made out. It was not sufficiently made out where the only fact on which it was founded was that by an agreement which did not expressly continue the conditions, land was taken from the farm. The conditions were quite applicable to the diminished holding.²⁴⁷ Nor is the landlord's consent presumed or dispensed with where the deviation is not wilful, but is occasioned by an accidental failure of part of a crop.²⁴⁸

On the other hand, abandonment of the claim has been gathered from acceptance or discharge of rent without reservation of the claim; and by circumstances inferring acquiescence in the deviations. To the former category belong two cases. In the earlier of the two, there were certain cropping regulations, without a prescribed rotation; and a certain acreage had to be left in grass (partly of a particular growth) at ish. In the event of contravention an additional rent of £5 an acre was exigible, nothing being said of the time of payment. The ordinary rents were annually paid and discharged by entries in a pass-book, without reservation, except in the last year of the lease when a discharge of rent reserved all claim for miscropping during the lease. The action was for additional rent on account of miscropping in various years and for lack of grass. It was held, as to the first claim, that for those years in which there was a settlement of rent without reservation, the landlord was barred by implied discharge but no further; and, as to the second claim, that the £5 per acre covered every deficiency both in the quantity of the grass land and in the quality of the grass.²⁴⁹ In the other case, the rule that a landlord is barred from recovering additional rent stipulated for miscropping, so far as applicable to years, the

Abandonment
of claim—
when not
inferred?

When in-
ferred?

Discharge of
rent.

²⁴⁶ *Witham v. White*, 1866, 38 Sc. Jur. 586.

²⁴⁷ *Hunter v. Clark*, 1810, Hume 852.

²⁴⁸ *Fraser v. Ewart*, 25th Feb. 1813, F.C. 223 (grass on $4\frac{1}{2}$ acres out of 6 failed;

this portion ploughed up after harvest and sown with barley and grass seeds).

²⁴⁹ *Hunter v. Broadwood*, 1854, 16 D. 441.

ordinary rent for which has been received and discharged by him without any reservation, was enforced where there was express provision for payment of the additional rent along with the ordinary rent, although there was another stipulation that nothing should liberate the tenant from liability for the additional rent except the written consent of the landlord to departure from the rotation.²⁵⁰

Acquiescence. Running parallel to the cases which have already been cited²⁵¹ to show the operation and the effect of acquiescence in depriving the landlord of his ordinary claim to damages for mismanagement are certain decisions in which the same equitable principle has been brought to bear on demands for pactional rent. A lease referred to regulations of older date in which a seven-shift rotation was prescribed, with relative pactional rent of £10 per Scotch acre in case of miscropping. The lease itself prescribed a six-shift course; and the tenant several years before the ish changed it to a five-shift. This was done with the landlord's full assent verbally conveyed, and there was ample proof of acquiescence and *rei interventus*. It was held that the claim for pactional rent on the footing of a six-shift was barred, even if, as was doubtful, it could be read into the lease from regulations applicable to a different sett.²⁵² Similarly, a lease prescribed a six and a seven-shift rotation respectively for different portions of the subject let, with a pactional rent for each acre miscropped. An alteration in the cropping took place early in the currency, and was continued in the knowledge of the landlord and his factor and without serious objection or attempt at restoration. There was admittedly no right to pactional rent except for the last year, since the rents had been paid and discharges granted without reservation until that time. It was held that there was also no claim for the last year, since there had been acquiescence in a state of things which it would have taken six years and not one year only to recall. Mere acquiescence was here equivalent to the verbal assent and acquiescence of the foregoing cases.²⁵³ In contrast to them must be read a decision of the House of Lords similar in principle though different in result. One mode of management was prescribed for the first sixteen years of a lease, another mode, enforceable by a pactional rent, for the remaining three. The rotation usual on the same estate was substituted

²⁵⁰ Baird v. Mount, 1874, 2 R. 101 ;
and see Lamb v. Mitchell's Trs., *infra*,
²⁵³

²⁵² Taylor v. Duff's Trs., 1869, 7 M.
351.

²⁵¹ *Supra*, p. 390.

²⁵³ Lamb v. Mitchell's Trs., 1883, 10
R. 640.

by the tenant with the landlord's acquiescence during the earlier years, and for the first of the three last. The rents of all these years was paid and discharged *simpliciter*, and the farm was in good order at ish. No claim for pactional rent was made till the last year. The tenant was held to be liable therefor in respect of contravention during the two last years, and the necessity for earlier notice in regard to what was really a new contract was expressly repudiated.²⁵⁴

Additional rent payable as a condition of a licence to alter the mode of management²⁵⁵ is undoubtedly rent, and payment may be enforced by means of all the remedies competent for the exaction of rent. If in other cases pactional rent is nothing more than liquidated damages, as has been submitted above,²⁵⁶ the remedies specially appropriated for that purpose would be inapplicable. The interest—a waning one—of the question lies in the point whether it may be exacted by means of sequestration on hypothec. The affirmative has been determined on what seems to be inconclusive reasoning;²⁵⁷ but the question has been subsequently treated as an open one.²⁵⁸

Where the compulsitor is not pactional rent, but penalty, a different set of rules comes into operation. The two agree in this that they are both prestable 'over and above performance,' whether that familiar phrase be used or not,²⁵⁹ and that in both cases, it is enough for the pursuer to point to the lease and the contravention without alleging damage.²⁶⁰ But they differ in this, that if a penalty exceeds the amount of the damage actually caused by non-payment, non-implement, or mismanagement, it is not exigible in full, but will be equitably modified, so as to cover the actual damage only.²⁶¹ This rule has been enforced, where the penalty was due in case of possession not being given, under a lease.²⁶² It includes the expenses incurred in obtaining implement, as for example in executing diligence; but where litigation is resorted to the expenses must be dealt with by the

²⁵⁴ *Miller v. L. Gwydir*, 1824, 3 S. 65 (N.E. 42), aff. 2 W. and S. 52.

²⁵⁵ *Stratton v. Graham*, *supra*, 234.

²⁵⁶ *Supra*, p. 397.

²⁵⁷ *Robertson v. Clark*, 1842, 4 D. 1317 (declared not penal; payable with the rent).

²⁵⁸ *Witham v. White*, 1866, 38 Sc. Jur. 586.

²⁵⁹ *Broomfield v. Young*, 1753, M. 9446; *Beattie v. Lambie*, 1695, M. 10039;

St. 1.17.20; *Ersk.* 3.3.86.

²⁶⁰ See *Craig v. M'Beath*, 1863, 1 M. 1020.

²⁶¹ St. 1.10.14; *Kames, Equity*, 352; B. Pr. 34, 149, 1221; 1 B.C. 655; 1 Bell, *Conv.* 254.

²⁶² *Veitch v. Paterson*, 1664, M. 11383; see *Wright v. M'Gregor*, 1826, 4 S. 434 (N.E. 440), and other cases not connected with leases in 1 B.C. 656, and B. Pr. 34.

Court.²⁶³ The *onus* lies on the contravener of proving the necessity for and amount of modification.²⁶⁴

Rules for discriminating between these compulsitors.

Much difficulty has arisen in determining whether the exaction stipulated for in any particular case is liquidated damages or penalty, an absolute or a modifiable claim. It is certain that the mere use of these terms in any particular case is not conclusive of the nature of the right or obligation.²⁶⁵ Thus what was really pactional rent has been called penalty;²⁶⁶ and *vice versa*.²⁶⁷ It is a question of intention.²⁶⁸ The fairness or exorbitancy of the demand is regarded as a legitimate element in the determination of the question: so much so that the distinction between liquidated damages and penalty seems to have disappeared in our most recent cases, or to have been reduced to this, that a penalty will in no case be respected as the measure of damage, while liquidated damages will in every case be so treated, unless there be *prima facie* evidence of gross and unconscionable discrepancy between the claim and the actual damage.²⁶⁹ No such case of oppression has arisen or is likely to arise where the liquidated damages take the form of pactional rent. A rule which solves most of the difficulties that have arisen has been thus formulated: 'When a single slump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious, and others but trifling damage, the presumption is that the parties intended the sum to be penal and subject to modification. The payments stipulated in the agreement in question [at the rate of £100 per imperial acre for ground not levelled and soiled over by a certain date after being covered with slag heaps] are not of that character: they are made proportionate to the extent to which the respondent company may fail to implement their obligation, and they are to bear interest from the date of the failure.'²⁷⁰

4. Arbitration.

In formal leases of agricultural subjects and minerals, an arbitration clause is almost invariably to be found. In the former case, it is mainly of use at ish; in the latter case it is not only

²⁶³ See 1 B.C. 657 and cases there.

²⁶⁴ See *Craig v. M'Beath*, *supra*,²⁶⁰

²⁶⁵ *Johnston v. Robertson*, 1861, 23 D. 646; *Elphinstone v. Monkland Co.*, 1886, 13 R. (H.L.) 98, 11 App. Cas. 332.

²⁶⁶ *Henderson v. Maxwell*, 1802, M. 10054; see *Craig v. M'Beath*, *supra*,²⁶⁰

²⁶⁷ See *Forrest & Barr v. Henderson*, 1863, 8 M. 187,

²⁶⁸ See *Dimich v. Corlett*, 12 Moo. P.C.C. 199, 229.

²⁶⁹ See *Forrest & Barr*, *supra*,²⁶⁷, *Robertson v. Driver's Trs.*, 1881, 8 R. 555.

²⁷⁰ *Per* L. Watson in *Elphinstone*, *supra*,²⁶⁵, at 13 R. (H.L.) 106, 11 App. Cas. 342; and see English cases cited.

of value then but practically indispensable during the currency, in order to obviate delay in the working pending the settlement of disputes which are more rapidly and efficiently disposed of by a reference to men of skill than by resort to the ordinary tribunals.²⁷¹

The clause, in the case of an agricultural lease, embodies usually nothing more than a mode of ascertaining the values of such dung, straw, or waygoing crop as the tenant would, at common law or by special stipulation, be entitled to take with him at removal, were it not that the landlord reserves right at his option, or binds himself, to take it over at a valuation.²⁷² Frequently also the damages caused by deviations from rules of cropping; the cost of labour on the fallow break, and of grass seeds, or of harrowing and rolling them in; and the annual value of land abstracted or damaged in pursuance of the landlord's reserved powers are similarly ascertained.²⁷³ The usual mode of providing for such a reference is by tacking to the clause which introduces a value to be ascertained such words as these: 'As such values [damages, &c.] shall be ascertained by two arbiters, one to be chosen by each party, or by an oversman, to be named by the said arbiters before entering on the reference in case of their differing in opinion,' and in subsequent clauses referring to this mode 'as aforesaid.' Or a separate clause may be introduced, providing for devolution to an oversman, for finality of the award, and for the event of a failure to name an arbiter or oversman.²⁷⁴

The function of arbiters under mineral leases is usually much more comprehensive. Besides special and limited duties in relation to the ascertainment of surface damages; of the value of machinery or buildings to be left behind at removing; of the cost of restoring the surface and fences *in statum quo*; and in relation to discrepancies between the books kept by the tenant and landlord respectively,²⁷⁵ arbiters are entrusted with very extensive powers, with the view of extricating the rights and obligations of the parties under the working clauses of the lease. These clauses are often very complicated and technical;²⁷⁶ they require immediate elucidation; and the work is best done if put into the hands of an expert in mining or engineering. The special clauses are similar to

²⁷¹ As to the advantages of such clauses see Pearson, *infra*, ²⁸², per L.P. McNeill, 21 D. 424; Chapman v. Edinburgh Prison Board, 1844, 6 D. 1288, per L. Cunningham; Shanks' Exrs. v. Aberdeen Ry. Co., 1850, 12 D. 787, per L. Mackenzie (1) The two last were contractors' cases.

²⁷² 1 Jur. Styles, 578, 580, 588, 594, 595, 602, 603.

²⁷³ Ibid. 578, 580, 583, 587, 597, 602.

²⁷⁴ See *ibid.* 595; by application to the Judge Ordinary.

²⁷⁵ Ibid. 611, 618, 637, 667.

²⁷⁶ Ibid. 621, 652, 658, 676, 680, 682.

those which occur in agricultural leases. Of the general clauses the following may be taken as a specimen:—‘For the various purposes before mentioned, in regard to which the appointment of a practical arbiter is contemplated for deciding any questions arising as to the working of the minerals hereby let or as to the interpretation or fulfilment of any condition or obligation in this lease or any other matter arising out of the non-fulfilment thereof, the parties mutually appoint , whom failing, by death, declinature, or inability to act, or otherwise , whom failing as aforesaid, such person as shall be nominated on the application of both or either of the parties hereto by .’²⁷⁷

It is, of course, out of the question to attempt here a sketch of the law of arbitration. It is only with a sense of misgiving, owing to the necessary inadequacy of the treatment here possible, that the temptation is resisted to refer the reader once and for all to the proper sources of instruction.²⁷⁸ It is conceivable, though not probable, that some benefit may be derived from observing what the law of arbitration owes to the law of landlord and tenant.²⁷⁹

These agreements to refer disputes which may arise, and these clauses of arbitration or submission are regarded as ancillary to the principal contract; coeval with it;²⁸⁰ not evacuated by the death of either party;²⁸¹ necessary to the extrication of the lease;²⁸² and latent till they are called into operation by the emergence of the situation contemplated. Being purely executorial, they will not be construed as extending beyond the life of the lease;²⁸³ unless it plainly appears that they are intended to apply to the mode of removing thereafter.²⁸⁴ Therefore, a claim raised subsequently to a removing for damages said to have been caused by contraventions of the lease during its currency, was determined to be beyond the scope of an ordinary arbitration

Ancillary to the lease during its currency.

²⁷⁷ Ibid. 621.

²⁷⁸ St. 4.2.18, 4.3.1; Ersk. 1.2.2; Menzies, Conv. 393; 1 Bell, Conv. 364; More's Notes, 43, 55; and especially Bell on Arbitration (2nd ed.); to which add cases collected in Digest 1877-85, s.v. Arbitration.

²⁷⁹ See cases of joint-tenants, Mackintosh v. Robertson, 1834, 12 S. 321; and of arbiter being disqualified by acquiring an interest, Tennent v. Macdonald, 16th June 1836, F.C. 818, 14 S. 976.

²⁸⁰ *Montgomerie v. Carrick*, 1849, 12

D. 274 (mineral lease); Pearson, *infra*, ²⁸²; *per* L. Ivory; see *Watmore v. Burns*, 1839, 1 D. 743 (judicial reference).

²⁸¹ See *E. Selkirk v. Naismith*, 1778, M. 627, Hailes 780 (sale); *Orrell v. Orrell*, 1859, 21 D. 554 (copartnership).

²⁸² *Per* L. Fullerton in *Montgomerie, supra*, ²⁸⁰; and in *Hendry's Trs., infra*, ²⁸⁰; Pearson v. Oswald, 1859, 21 D. 419.

²⁸³ Pearson, *supra*, ²⁸², *per* L.P. McNeill.

²⁸⁴ Ibid. *per* L. Ivory.

clause,²⁸⁵ though a similar claim made during the currency might have been deemed to affect the *executing* of the lease, and therefore to be *intra vires*.²⁸⁶ The clauses are not evacuated or exhausted till a valid award has been made; otherwise a condition of the contract would remain unfulfilled though part and parcel of the whole and never surrendered.²⁸⁷ It would appear that if there be no provision for the appointment of an oversman, the Court cannot supply the defect.²⁸⁸ It may be a question, whether and after what interval either party may demand a reference of new; or whether the Court would at once order an inquiry after its own methods.²⁸⁹ When exhausted?

The rule that a submission is invalid which does not name the arbiter or arbiters appointed, has no application to these ancillary references, where they relate to disputes (in the proper sense of the word) which are foreseen as probable or possible in the course or at the termination of the lease in regard to special matters, or where they relate merely to the adjustment of a condition or the liquidation of an obligation.²⁹⁰ Of this nature are the purchase (at entry) and sale (at ish) of machinery;²⁹¹ indemnification for surface damages;²⁹² indemnification for loss to a tenant through resumption of the subjects by the landlord;²⁹³ exhaustion of minerals;²⁹⁴ taking over stock or crop, or other subjects on a farm at a valuation;²⁹⁵ loss of water-power;²⁹⁶ augmentation of rent after a break;²⁹⁷ and ascertainment of rent.²⁹⁸ But the general rule obtains where the clause of reference, though ancillary to the principal contract, is more general, as for example

²⁸⁵ Pearson, *supra*, ²⁸².

²⁸⁶ *Montgomerie v. Carrick*, *supra*, ²⁸⁰ (turned on homologation). In other departments of the law, the following cases may be consulted:—*Alexander's Trs. v. Dymock's Trs.*, 1883, 10 R. 1189 (extricating state of accounts); *Kirkwood v. Morrison*, 1877, 5 R. 79, and *Beattie v. Macgregor*, 1883, 10 R. 1094 (contract or execution of the work); *Ramsay v. Strain*, 1884, 11 R. 527 (surface damages).

²⁸⁷ *Dixon v. Campbell*, 1830, 8 S. 970; *Smith v. Wharton*, 1843, 5 D. 749.

²⁸⁸ *Dixon*, *supra*, ²⁸⁷; *Merry v. Brown*, 1860, 22 D. 1148; see 1 M. (H.L.) 14.

²⁸⁹ Cf. the two last cases.

²⁹⁰ *Hendry's Trs. v. Renton*, 1851, 13 D. 1001, esp. *per* L. Fullerton, p. 1007.

²⁹¹ *Wilson v. Douglas*, 1868, 7 M. 112;

Houldsworth v. Brand's Trs., 1876, 4 R. 369.

²⁹² *Ibid*.

²⁹³ *Smith*, *supra*, ²⁸⁷.

²⁹⁴ *Dixon*, *supra*, ²⁸⁷; *Cochrane v. Guthrie*, 1859, 21 D. 369; *Merry v. Brown*, 1859, 21 D. 1337, aff. 1 M. (H.L.) 14. The referees may proceed by inspection or taking evidence or both—*Cochrane*; and cf. *Rankin v. Marshall*, 1860, 22 D. 351.

²⁹⁵ *Munro v. Mackenzie*, 1823, 2 S. 593 (N.E. 508)—stock; *Nivison v. Howat*, 1883, 11 R. 182; *Gibson's Trs. v. Fraser*, 1877, 4 R. 1001 (crop); *Sinclair v. Fraser*, 1884, 11 R. 1139 (labour, grass, pipes).

²⁹⁶ *Campbell v. Shaw's Water Co.*, 1864, 2 M. 1130.

²⁹⁷ *Wallace v. Tacksman*, 1715, 5 B.S. 7.

²⁹⁸ *Robertson v. Boyd*, 1885, 12 R. 419.

where it governs the whole working of minerals let;²⁹⁹ or authorises the arbiters to determine the 'true intent and meaning' of the stipulations of the lease;³⁰⁰ or where the points submitted to the arbiters involve such mixed questions of law and fact as the existence and effect of *mora*, homologation, or tacit relocation.³⁰¹

Scope of
reference.

The question of the necessity of naming arbiters, and the further question whether the arbiters have or have not strayed *ultra fines compromissi* depend entirely on the terms used in each particular lease. Some guidance may be obtained from a collation of the clauses which have been subjected to the scrutiny of the Court in the cases cited and in other cases to be found in the books. The Court attempts to discover the intention of the parties from a consideration of the whole of the principal contract, general words being construed in view of the special stipulations thereof, and in view of the special advantages to be obtained from recourse to men of skill rather than to the ordinary tribunals.³⁰²

Procedure.

Where the aim of a reference is simply the ascertainment of values, considerable laxity of procedure is allowable, provided the valuation is set about fairly.³⁰³ Thus, where a third party (called an oversman) was called in on account of a difference of opinion between the referees in valuing a waygoing crop, and he without specially applying his mind to the points on which they had agreed, adopted their conclusions thereanent, and settled the points left open, the award was held to be unassailable.³⁰⁴ It seems doubtful whether in such a case a devolution to the oversman should be preferred to an order to take evidence, where the referees have agreed in most points, but have failed to agree as to some matter as to which one of them has no knowledge or

²⁹⁹ Hendry's Trs., *supra*,²⁹⁰.

³⁰⁰ Pearson v. Oswald, *supra*,²⁸²; Hendry's Trs., *supra*,²⁹⁰; and see contractors' cases in Greenock Par. Board v. Coghill & Son, 1878, 5 R. 732; Levy v. Thomsons, 1883, 10 R. 1134; and a railway lease case, Caledonian Ry. v. Greenock, &c., Ry., 1872, 10 M. 892, aff. 1 R. (H.L.) 8.

³⁰¹ Pearson, *supra*,²⁸² (meaning and execution) and in other departments—Howden & Co. v. Dobie & Co., 1882, 9 R. 753; Ramsay v. Strain, *supra*,²⁸⁶.

³⁰² See esp. the cases of Pearson; Merry; Alexander's Trs.; Kirkwood; Beattie; Ramsay; Levy; Greenock Par.

Board; Howden & Co.; and Mungle v. Young, 1872, 10 M. 901.

³⁰³ McGregor v. Stevenson, 1847, 9 D. 1056.

³⁰⁴ Nivison v. Howat, *supra*,²⁸⁵. This decision runs counter to the law laid down in Frederick v. Maitland, 1865, 3 M. 1069; which case seems also to err on the side of over-formality in demanding a written devolution where the submission, though formal, was really in extrication of the lease. But the judgment may be justified on the ground that no decision was ever in fact reached by the mode prescribed.

skill.³⁰⁵ It would appear that the award in such valuations needs not be probative.³⁰⁶

C. REAL CONDITIONS.

There is an important distinction between those rights and obligations of landlord and tenant respectively, which accrue to or bind (as the case may be) on the one hand the owner of the subject let, whoever he may be, and those in his right, whoever they may be, and on the other hand the tenant or those in his right, whatever may be the nature of their title, and those rights and obligations which accrue to or bind (as the case may be) only the lessor and his representatives on the one hand, and the lessee and his representatives on the other. More succinctly stated, the problem for solution is, what rights and obligations transmit in favour of or against singular successors of the landlord³⁰⁷ and assignees of the lessee? or—to adopt the Scotch nomenclature, which is more familiar in the law of feudal than in the law of leasehold tenure—what are and what are not real conditions? or—to use phraseology of the English law imported into Scotch practice by the *dicta* of English lawyers in Scotch appeals, and now in common use—what stipulations or conditions (or covenants) do and what do not *run with* the reversion or *run with* the land.³⁰⁸ The subject has already been noticed in earlier parts of this treatise, in considering the effect of the Act of 1449,³⁰⁹ the right to and liability for rent,³¹⁰ the law of repair and melioration,³¹¹ and the rights and obligations of assignees to a lease.³¹² It will be unnecessary to make any further reference to the rules relating to assignments; and the cases which illustrate the other topics here referred to will only be used for two purposes, which are alone left for consideration—viz., to set out the general law regarding real conditions in leases, and to explain how that law is observed in dealing with the conditions which have formed the subject of

Conditions
real and
personal.

Running with
the land or
reversion.

³⁰⁵ L. Young's dissent in *Sinclair v. Fraser*, 1884, 11 R. 1139, is supported by the First Division in the later case of *Forbes v. Underwood*, 1886, 13 R. 465. As to homologation of an informal award, see *Robertson v. Boyd*, *infra*, ³⁰⁶.

³⁰⁶ *Robertson v. Boyd*, 1885, 12 R. 419.

³⁰⁷ See an abnormal case where in a lease the possible sale of the land was expressly provided for, *M'Michan v. Hutcheson*, 1801, 2 Bell, Leases, 101, 4 Pat 170.

³⁰⁸ The best repertory of English rules is to be found in the notes to *Spencer's case*, 1 Sm.L.C. 68. See also *Woodfall*, 163. The rules which depend on the presence or absence of the word 'assigns' (so far as they still hold) have no analogue in our law.

³⁰⁹ *Supra*, p. 130.

³¹⁰ *Supra*, pp. 281, 313.

³¹¹ *Supra*, pp. 226, 233.

³¹² *Supra*, p. 178.

the present chapter. What conditions, then, are capable of transmitting to and against singular successors of a lessor?

Conditions
real in the
person of the
landlord.

The rule is thus stated by Lord Ivory (the stipulation in question being an arbitration clause):—‘The obligation to refer, ‘not having reference to any matter merely extrinsic, or which ‘can be regarded as in any proper sense foreign to the proper ‘object of the lease, but, on the contrary, constituting an express ‘condition of the contract and necessary to its extrication, ‘according to the *modus operandi* intended and bargained for ‘from the first, it must receive effect as a stipulation essentially ‘inseparable from the whole substance of the right.’³¹³ And conditions which are not real are in contradistinction described by Lord Jeffrey in the same case, after a consideration of earlier decisions, as ‘stipulations which bear reference to the private ‘relation of the contracting parties and do not bear reference to ‘the general relation of landlord and tenant.’³¹⁴ The shorter description of these latter stipulations—that they are merely personal and collateral to the subject let³¹⁵—does nothing towards a further elucidation of the principle. It may be doubted whether the Court is entitled to inquire into the reasonableness of a condition.³¹⁶

Implied
conditions.
Express
conditions.

Inferring
obligations on
landlord.

To the class of real conditions belong necessarily all implied conditions; and (of stipulations contrary to the landlord’s interests) such express conditions as a landlord’s obligation at his tenant’s removing to pay the value of enclosures constructed by the tenant and left by him sufficient;³¹⁷ an obligation to allow a tenant to remove the doors and windows and to reimburse him for the value of the fabric of houses;³¹⁸ to pay or allow for meliorations generally;³¹⁹ to pay for repairs or for the value of houses erected by the tenant, being sufficient for their purpose and not more than sufficient, though built prior to the purchase;³²⁰ to allow abatement of rent, if binding on the lessor *de futuro*;³²¹ or to give effect to a change in the form of pay-

³¹³ In *Montgomerie v. Carrick*, 1848, 10 D. 1387, 1392. See also *per* L. Boyle contrasting extrinsic and essential stipulations, p. 1395.

³¹⁴ 10 D. 1396.

³¹⁵ See Woodfall, 166; 1 Sm.L.C. 77, *et seq.*

³¹⁶ See *Stewart v. M’Ra*, 1834, 13 S. 4.

³¹⁷ *Arbuthnot v. Colquhoun*, 1772, M. 10424; *M’Doual v. M’Douall*, 1760, M. 15259.

³¹⁸ *Bells v. Lamont*, 14th June 1814,

F.C. 645.

³¹⁹ *Stewart v. E. Dunmore’s Tr.*, 1837, 15 S. 1059 (provided for specially in the sale); *Stewart v. M’Ra. supra*, ³¹⁶ (heritable creditor).

³²⁰ *Fraser v. Maitland*, 1824, 2 S. App. 37. *Rae v. Finlayson*, M. 10211, depended on the unusual occurrence of leases in burghs, and probably would not be repeated.

³²¹ *Riddick v. Wightman*; *Grant v. Watt, infra*, ³³⁵.

ment of rent.³²² Of real conditions, which transmit as rights in favour of the lessor's singular successors, the following may be cited as illustrations:—right to delivery of mineral in a certain quantity periodically over and above rent or lordship;³²³ and right to damages for miscropping³²⁴ or disrepair.³²⁵ It seems to be the better opinion that a singular successor is bound by a reference clause in so far and only in so far as it is ancillary to a real condition.³²⁶

Conferring rights on him.

On a review of these cases in which the present question actually arose for decision, and looking to the scope of the general rule indicated above, the opinion may be hazarded that, besides the implied and ordinary conditions as to possession, rent, and improvements, all the covenants which have formed the subject of the present chapter transmit for or against singular successors of the landlord as the case may be. If there be no special warrandice, such of them as are burdens on the lessor's right transmit against his singular successors without involving a claim of relief against him.³²⁷

General rule.

Of the conditions which are merely personal to the lessor and his representatives, the typical examples are those abnormal stipulations regarding the endurance of a lease and the employment of the rent in payment or security of debt, which, as has already been pointed out, carry the whole lease out with the provisions of the Act of 1449.³²⁸ Of the same character, is a stipulation for deduction from rent in consideration of services to be rendered by the tenant to the landlord.³²⁹

Personal conditions.

The existence of a real condition may be instructed by the lease itself; by proof of custom;³³⁰ by supplementary writ in amendment of the lease; or by proof of a verbal innovation on the lease, followed by *rei interventus*.³³¹ A singular successor of the landlord may also be barred from enforcing certain conditions of a lease as they stand by acquiring under circumstances in which due and ample notice of an

Real condition—how proved.

³²² Baillie v. Fraser, 1853, 15 D. 747.

³²³ Walpole v. Beaumont, 1780, M. 15249.

³²⁴ Carnegie v. Guthrie, 1866, 5 M. 253; Hall v. M'Gill, 1847, 9 D. 1557.

³²⁵ Hall v. M'Gill, *supra*, ³²⁴.

³²⁶ Montgomerie v. Carrick, *supra*, ³¹³; esp. *per* L.L. Fullerton and Jeffrey, 10 D. 1396.

³²⁷ Murray v. Selkirk, 26th Jan. 1815, F.C. 176.

³²⁸ *Supra*, p. 130.

³²⁹ Ross v. Cs.-Ds. of Sutherland, 1848, 16 S. 1179, with which contrast Lundy v. Smith of Lundy, 1610, M. 15166, and see *supra*, p. 130. The English cases as to real covenants are very numerous, but do not afford a safe guide to a Scotch lawyer. See enumerations in 1 Sm.L.C. 80; Woodfall, 163, 165, and 561 *et seq.*

³³⁰ Bells v. Lamont, *supra*, ³¹⁸.

³³¹ Baillie v. Fraser, *supra*, ³²²; Kirkpatrick v. Allanshaw Coal Co., 1880, 8 R. 327.

innovation has been expressly given or may be fairly implied, as where he visited a farm before purchasing and might have seen that it was not being cultivated according to the shift prescribed in the lease—the fact being that a change had taken place with the approval of the former landlord.³³² The same result is attained in a roundabout way where, the innovation not being good against a singular successor in any of these ways, he is taken bound in his title or otherwise to relieve the vendor of liability to tenants in terms wide enough to strike at the obligation in question.³³³ But the alteration must be intended as a continuing one ;³³⁴ and therefore it is not enough in support of a right to abatement of rent for the future³³⁵ to prove that the vendor granted receipts for rents lower than those exigible under the lease.

Apportion-
ment of
liability.

Difficulties sometimes arise in determining which of two parties—the lessor or his singular successor—is primarily or solely liable in obligations to the tenant or is in right of obligations prestable by him. Thus—to take the liability first—where a lessor stipulated for the erection of a building by the lessee in consideration of a sum to be deducted from rent and the building was begun and completed in the interval between a sale of the land by the lessor and the term when the last rent due to him was payable, the burden as well as the benefit was held to fall on the purchaser, and the tenant was not entitled to retain from the vendor any part of that rent.³³⁶ A purchaser in March with entry at Whitsunday was bound in the articles of roup to implement all the conditions and obligations of current leases. Certain leases on the estate ran out at the said Whitsunday and the separation of crop following, these were held to be current leases in the sense of the articles.³³⁷ It is the same with conditions in the landlord's favour. A purchaser who allowed a tenant, whose lease expired simultaneously with the vendor's right, to possess by tacit relocation for two years was held entitled to complain of miscropping during these years and these only, though in order to ascertain the nature of the deviations from the prescribed culture it might be necessary to advert to the state of the crop in the year preceding the purchase. He was also *in*

Apportion-
ment of rights.

³³² *Carnegie v. Guthrie*, *supra*, ³²⁴; see also *Rae v. Finlayson*, *supra*, ³²⁰.

³³³ *Bruce v. M'Leod*, 1822, 1 S. Ap. 213.

³³⁴ *Lindsay v. Webster*, 1841, 4 D. 231.

³³⁵ *Riddick v. Wightman*, 1790, and *Grant v. Watt*, 1802, *Hume* 776, 777;

supra, p. 408; *Hall v. M'Gill*, *infra*, ³³⁸.

³³⁶ *Morison v. Patullo*, 1787, M. 10425. Contrast *Walpole v. Beaumont*, 1780, M. 15249 (arrears of price of rent coal).

³³⁷ *Stewart v. E. Dunmore's Tr.*, *supra*, ³¹⁹; see *Macdonald v. Johnstone*, 1883, 10 R. 959.

titulo to insist on implement of outgoing stipulations as to the repair of houses and fences.³³⁸ For similar reasons, it is established that, where a tenant's obligation is continuous or recurrent, a singular successor is not entitled to damages for a breach which has taken place before his entry, or to specific implement unless his author's right of recourse has been specially assigned to him.³³⁹

³³⁸ *Hall v. M'Gill*, 1847, 9 D. 1557.

³³⁹ *Hamilton v. Fleming*, 1793, Hume 787.

CHAPTER XVIII.

WILD ANIMALS : GAME : BIRDS PROTECTION ACTS.

Plan of
chapter.

It will be readily understood that no attempt can be made in this work to expound the law relating to the capture and disposal of wild animals.¹ Attention will, as far as possible, be confined to those parts of that law which are affected by the law of landlord and tenant. The most convenient arrangement seems to be to keep in view more especially the rights and obligations of tenants, agricultural and sporting, and to proceed according to the following division. I. The rights and obligations of occupiers of land including tenants other than sporting tenants, as affected by the public law relating to wild animals; II. The rights and obligations of these tenants in questions with their landlord and his game tenants; III. The rights and obligations of game or sporting tenants in questions with their landlords; and IV. Their rights and obligations in questions with agricultural tenants. It may be stated in the outset in order to limit the scope of this chapter still further, that there is nothing, either in the statutes or in the decisions² relating to fishings, that does not apply to landowners and their fishery tenants equally. Both are equally bound by the public law of fishings; and questions between them will be determined according to the ordinary law of leases.

Fishings ex-
cluded.

I. RIGHTS AND OBLIGATIONS OF OCCUPIERS OF LAND IN GENERAL.

A marked distinction is drawn between animals which are and animals which are not protected by statute. To the first class belong certain wild birds; the class of animals known as

¹ The authorities are collected and commented on fully in Irvine on the Game Laws and Stewart on Fishing; and more briefly in Rankine on Land-

ownership, 128, 727.

² See Stewart on Fishing, *passim*; Rankine on Landownership, 257, 765, 167, 482, 865.

game; and rabbits. To the second class belong all other animals.³

(a) The subsisting Wild Birds Protection Acts, 1880 and 1881⁴ —while imposing penalties on ‘any person who between the first day of March and the first day of August in any year . . . shall knowingly and wilfully shoot or attempt to shoot or shall use any boat for the purpose of shooting or causing to be shot any wild bird or shall use any lime, trap, snare, net, or other instrument for the purpose of taking any wild bird, or shall expose or offer for sale or shall have in his control or possession after the fifteenth day of March any wild bird recently killed or taken’—exempts the occupier of any land or any person authorised by the occupier of any land who kills or takes any wild bird not scheduled (Act 1880, sect. 3). The schedule contains eighty-six names of privileged birds;⁵ and the penalty is a fine not exceeding £1 for every such bird (*ibid.*). The close time may be varied, and districts exempted (sect. 8) by the Secretary for Scotland.⁶ The complaint is taken to the sheriff (sects. 2 and 6). An additional fine not exceeding ten shillings may be imposed on an offender who refuses to give his real Christian name, surname, and place of abode, or gives an untrue name or place of abode to any person who requires the same (sect. 4).

Birds Protection Acts.

(b) The other wild animals which are protected by statute are game⁷ and rabbits.⁸

Game and rabbits.

³ Tame pigeons are dealt with by statute, though not in the way of protection now-a-days, 1617, c. 19; Irvine, 23; Rankine, 129.

⁴ 43 & 44 Vict. c. 35; 44 & 45 Vict. c. 51; Irvine, 250; Rankine, 129.

⁵ *Viz.* American quail, auk, avocet, bee-eater, bittern, bonxie, colin, Cornish chough, coulterneb, cuckoo, curlew, diver, dotterel, dunbird, dunlin, eider duck, fern owl, fulmar, gannet, goatsucker, godwit, goldfinch, grebe, greenshank, guillemot, gull (except black-backed gull), hoopoe, kingfisher, kittiwake, lapwing, lark (this added by Act, 1881, sect. 2), loon, mallard, marrot, merganser, murre, nighthawk, nightjar, nightingale, oriol, owl, oxbird, oyster-catcher, peewit, petrel, phalarope, plover, plover's-page, pochard, puffin, purre, razor-bill, red-shank, reeve or ruff, roller, sanderling, sandpiper, scout, sea-lark, seamew, sea-parrot, sea-swallow, shearwater, shell-

drake, shoveller, skua, smew, snipe, solan goose, spoonbill, stint, stone-curlew, stone-hatch, summer snipe, tarrock, teal, tern, thick-knee, tystey, whaup, whimbrel, widgeon, wild duck, willock, woodcock, woodpecker.

⁶ 48 & 49 Vict. c. 61.

⁷ See the extension of this term, described in Irvine, 6 *et seq.* Various protecting Acts still in observance mention the following—bustard, capercaillie, grouse, blackgame, landrail, partridge, pheasant, quail, snipe, wild duck, woodcock, deer, hare. Qu. as to plover. The Act founded on in each case should be examined for its enumeration (if any); but the enumeration which seems to be accepted in modern legislation is that of the Night Poaching Act—viz., hares, pheasants, partridges, grouse, heath or moor game, blackgame, and bustards.

⁸ Rabbits are not game—*Moncrieff v. Arnott*, 1528, 6 S. 530.

Landed
qualification.

The landed qualification introduced by the old Act 1621, c. 31, by enacting 'that no man hunt or haulk at any time here-
' after who hath not a plough of land in heritage,' is not satisfied by the production of a leasehold right⁹ however prolonged, or even if virtually perpetual.¹⁰ A tenant can therefore escape the penalties of the statute only by obtaining (by lease or otherwise) the permission of a qualified person to pursue and take game on the lands of the latter.¹¹

Night Poach-
ing Acts.

It is no defence under the Night Poaching Acts¹² that the accused is the agricultural tenant of the land on which the offence was committed.¹³ Occupiers of lands, their servants, and persons assisting their servants are among the persons who are entitled to seize and apprehend offenders against the leading statute, either upon such lands or, in case of pursuit being made, in any other place, and to deliver them over into custody;¹⁴ and where the offence takes place on a public road the same power is conferred on the occupiers of the adjoining lands and their servants and assistants.¹⁵

Day Trespass
Act.

The terms of the leading enactment of the Day Trespass Act¹⁶ are that 'if any person whatsoever shall commit any trespass by
' entering or being in the day time upon any land without leave
' of the proprietor, in search or pursuit of game, or of deer, roe,
' woodcocks, snipes, quails, landrails, wild ducks, or conies,' he shall incur certain penalties which are enhanced if he had his face blackened, coloured, or otherwise disfigured for the purpose of disguise, or if he was of a party of five or more persons.¹⁷ Occupiers of lands, their gamekeepers and servants, and persons authorised by such occupiers are entitled to require offenders to quit such lands, and also to tell their Christian names, surnames, and places of abode, and, in case of their refusing to tell their real names or places of abode, or giving illusory descriptions of the latter, or wilfully continuing or returning upon the lands,

⁹ *Ms. Tweeddale v. Somner*, 1808, in note, 18 F.C. 510.

¹⁰ *E. Hopetoun v. Wight*, 17th Jan. 1810, F.C. 507; and see *Wellwood v. Husband*, 1874, 1 R. 507; B. Pr. 953.

¹¹ *Trotter v. MacEwan*, 8th July 1809, F.C. 406.

¹² 9 Geo. IV. c. 69; 7 & 8 Vict. c. 29; *Irvine*, 175; *Rankine*, 727, 740.

¹³ *Smith v. Young*, 1856, 2 Irv. 402. This policy is carried out in the Ground Game Act, 43 & 44 Vict. c. 47, sect. 6, and in 11 & 12 Vict. c. 30, sect. 4, which

relate to shooting by night.

¹⁴ 9 Geo. IV. c. 69, sect. 2. The use of violence by the accused is heavily punished, *ibid*.

¹⁵ 7 & 8 Vict. c. 29.

¹⁶ 2 & 3 Will. IV. c. 68, sect. 1; *Irvine*, 149; *Rankine*, 733.

¹⁷ Nothing is said in the aggravations about the proprietor's leave, but probably the want of it is implied in the word 'trespass;' see *Birrel v. Jones*, 1859, 3 Irv. 546.

to apprehend them, and take them before the sheriff (sect. 2) ; and also to seize the game in their possession for the use of the person entitled to the game upon the lands (sect. 5).

It was early decided, though by a narrow majority, that the statutory trespass could not be committed by a tenant of the lands on which it was alleged to have taken place.¹⁸ The decision has been followed ; and the law is now held to be settled.¹⁹ The exemption does not extend to farm-servants.²⁰ It is difficult to justify the exemption on any ground of principle,²¹ and still more difficult to account for the distinction, for the farmer and his servants are equally entitled to be on the lands in the way of their business ; and their functions in the administration of the statute are the same. It is a sufficient defence for a farm-servant accused of shooting rabbits in contravention of the Act, to prove that he had his master's orders to shoot them, though his master's lease reserved the rabbits on the farm to the landlord.²² It may be doubted whether a farm-servant was rightly acquitted, who being lawfully employed by the tenant to snare rabbits, set his dog at, captured, killed, and removed a hare which, having been taken by him from a snare, apparently dead, escaped out of his hands.²³ Relatives, visitors, boarders, and persons who assist in the farm-work without wage, are in a less favourable position than farm-servants.²⁴ The legality of their interference with the game or rabbits on the farm depends on the question whether any communicable right is vested in the tenant at common law, under his lease or by statute.²⁵ A game tenant is none the less entitled to take proceedings under the above Acts, though he is also the agricultural tenant ; and the nomenclature of the 7th section of the Ground Game Act²⁶ is held to imply, though it does not clearly express, this rule.²⁷

Agricultural
tenant not
struck at.

But servants

and inmates
are.

Title to
complain.

¹⁸ *Smellie v. Lockhart*, 1844, 2 Broun, 194.

¹⁹ *E. Kinnoull v. Tod*, 1859, 3 *Irv.* 501.

²⁰ *E. Selkirk v. Kennedy*, 1850, *J. Shaw*, 463 ; *Raper v. Duff*, 1860, 3 *Irv.* 529. As to trespass by a game-watcher, see *Landon v. Watt*, 1874, *Guthrie's Dec.* 280.

²¹ See last paragraph ; *Fergusson v. Shirreff*, 1844, 6 *D.* 1363, 1371, *per L. Moncreiff* ; *Reg. v. Pratt*, 4 *E. and B.* 860 ; *Mains v. M'Lulich*, 1860, 3 *Irv.* 533 ; *Colquhoun v. Liddell*, 3 *Coup.* 342, 4 *R. (Just.)* 3 ; *Stoddart v. Stevenson*, 1880, 7 *R. (Just.)* 11, 4 *Coup.* 334.

²² *Calder v. Robertson*, 1878, 4 *Coup.*

181, 6 *R. (Just.)* 3 ; *Jack v. Nairne*, 1887, 24 *Sc.L.R.* 350.

²³ *Lawrie v. M'Arthur*, 1880, 8 *R. (Just.)* 2, 4 *Coup.* 346.

²⁴ *Black v. Bradshaw*, 1875, 3 *Coup.* 209, 3 *R. (Just.)* 18 ; see *Porter v. Stewart*, 1858, 3 *Irv.* 57, 499.

²⁵ *Stuart v. Murray*, 1884, 12 *R. (Just.)* 9 (common law or Ground Game Act) ; *M'Adam v. Lawrie*, 1876, 3 *Coup.* 223, 3 *R. (Just.)* 20 ; *James v. E. Fife*, 1880, 4 *Coup.* 321, 7 *R. (Just.)* 9.

²⁶ 43 & 44 *Vict. c.* 47, sect. 7.

²⁷ *Fergusson v. M'Nab*, 1885, 12 *R.* 1083. *Gordon v. Morgan*, 1884, 29 *Journ. of Jurispr.* 53.

Game Licences
Acts.

The subsisting Game Licences Act while requiring a licence to entitle any one to take, kill, or pursue game or rabbits, excepts from its provisions, *inter alia*, 'the taking and destroying of 'conies [rabbits] in Great Britain by the proprietor of any warren 'or of any enclosed ground whatever, or by the tenant of lands 'either by himself or by his direction or permission.'²⁸ It also adopts²⁹ the provisions of an earlier statute³⁰ which was principally, though not exclusively or even directly, intended for the benefit of farming tenants. This statute makes it 'lawful for any 'person having at present a right to kill hares in Scotland to do so 'himself, or by any person permitted, directed, or commanded by 'him by any writing under his hand without the payment of any 'such duties of assessed taxes as aforesaid [in the preamble], and 'without obtaining an annual game certificate; provided always 'that such hares shall be found and killed in or upon his 'own land; provided also that no person permitted, directed, or 'commanded as aforesaid shall have any power to authorise any 'other person whatever to take or destroy any hare' (sect. 1), or 'shall unless otherwise chargeable be liable to duties of assessed 'taxes as gamekeeper' (sect. 2). Any person may also 'law- 'fully pursue and kill, or join in the pursuit and killing, hares by 'coursing with greyhounds, or by hunting with beagles or other 'hounds without the having obtained an annual certificate' (sect. 3).³¹ Then by the Game Laws Amendment Act, 1877,³² a lessee in the actual occupation of lands and having the right of killing hares thereon may, by himself or by any person directed or authorised by him in writing, pursue, take, kill, or destroy hares then being in or upon any such land without obtaining any game certificate; provided he authorises only one person at a time upon land occupied by him in any one parish, and intimates the authority to the landlord or his factor. Lastly, the occupier and persons duly authorised by him and thus entitled under the Ground Game Act³³ to kill and take hares and rabbits may lawfully do so without obtaining a game licence.

Game Act,
1877.

Gun Licence
Acts.

One of the exemptions from liability for penalties under the Gun Licence Act³⁴ is conceived in favour of 'the occupier of any 'lands using or carrying a gun for the purpose only of scaring

²⁸ 23 & 24 Vict. c. 90, sect. 5, excep-
tion 2.

²⁹ Ibid., exemption 4 and sect. 6. The
Act is amended by 46 Vict. c. 10, sects.
4, 5.

³⁰ 11 & 12 Vict. c. 30.

³¹ Repeated in Game Licence Act,

sect. 5, exception 3.

³² 40 & 41 Vict. c. 28, sects. 8, 9.

³³ 43 & 44 Vict. c. 47, sect. 4, *infra*,
p. 427.

³⁴ 33 & 34 Vict. c. 57, sect. 7 (4).
The Act is amended by 46 Vict. c. 10,
sect. 6.

'birds or of killing vermin on such lands, or any person using or carrying a gun for the purpose only of scaring birds or of killing vermin on any lands by order of the occupier thereof, who shall have in force a licence or certificate to kill game or a licence under this Act.' The provisions of this statute are not affected by the Ground Game Act.³⁵ It is settled that rabbits are vermin in the sense of this section, that is to say, in relation to the crops of a farm.³⁶ The question has never been decided whether wood-pigeons are vermin which it is lawful under this section not merely to scare but to kill; but the answer can scarcely be doubtful, since the Revenue authorities did not venture in a case which was free from specialties to press for the penalties.³⁷

It is proper now to notice two sets of restrictions which, although general and not affected by any specialties in the case of farm tenants, are to them of the greatest importance.

Two of the statutes already noticed touch upon the use of Use of poison. poison. By the Act of 1848,³⁸ which mainly relates to the capture of hares, it is enacted (sect. 4), that nothing in it shall make it lawful 'for any person, with intent to destroy or injure any hares or other game, to put or cause to be put any poison or poisonous ingredient on any ground, whether open or enclosed, where game usually resort, or in any highway.' By the Ground Game Act,³⁹ it is enacted under a penalty (sect. 6) that 'no person having a right of killing ground game under this Act or otherwise . . . shall employ poison.' These enactments stand in the statute-book alongside of two Acts passed in the interval between them. The earlier of the two prohibits the sale and sowing of poisoned grain.⁴⁰ The enactment relating to sowing (sect. 3) authorises the infliction of a fine not exceeding £10, on 'every person who shall knowingly and wilfully sow, cast, set, lay, put, or place, or cause to be sown, cast, set, laid, put, or placed into, in, or upon any ground or other exposed place or situation any grain seed or meal which has been so steeped or dipped in poison, or with which poison or any ingredient or preparation has been so mixed, as thereby to render such grain seed or meal poisonous and calculated to destroy life.' But 'nothing in this Act shall prohibit . . . the use of any solution

³⁵ 43 & 44 Vict. c. 47, sect. 4.

³⁶ *Gosling v. Brown*, 1878, 5 R. 755 (diss. L. Ormidale).

³⁷ *Connacher v. Bryson*, 1875, cited in *Irvine*, 246, and *Rankine*, 751. The case was dropped on the advice of L. Adv. Watson.

³⁸ 11 & 12 Vict. c. 30.

³⁹ 43 & 44 Vict. c. 47; see *infra*, p. 427, and obs. in *Brown v. Thomson*, 1881, 9 R. 1183, 1188, and *Fraser v. Lawson*, 1882, 10 R. 396, 408, 411, on the public policy of this enactment.

⁴⁰ 26 & 27 Vict. c. 113 (1863).

‘ or infusion, or any material for dressing, protecting, or preparing any grain or seed for *bond fide* use in agriculture only, or the sowing of such last-mentioned grain or seed so prepared ’ (sect. 4). The later Act, passed in the following year,⁴¹ extends the provisions of this statute to ‘ poisoned flesh or meat which has been mixed with, or steeped in, or impregnated with poison or any poisonous ingredient,’ with a similar result (sect. 2). But nothing in this Act shall make it unlawful for the occupier of any dwelling-house or other building, or the owner of any rick or stack of wheat, barley, oats, beans, peas, tares, seeds, or of any cultivated vegetable produce, to put or place, or cause to be put or placed in any such dwelling-house or other building, or in any enclosed garden attached to such dwelling-house, or in the drains connected with such dwelling-house, provided that such drains are so protected with gratings or otherwise as to prevent any dog from entering, or within such rick or stack, any poison or poisonous ingredient or preparation for the destruction of rats, mice, or other small vermin ’ (sect. 3).⁴²

Use of firearms
by night.

Apart from the provisions of the Night Poaching Act,⁴³ there are two enactments relating to the use of firearms by night. The above-mentioned Act of 1848,⁴⁴ which permits the killing of hares by certain persons without having a game licence, contains a proviso (sect. 4) that it shall not make it lawful for any person to use any firearms or gun of any description,⁴⁵ for the purpose of killing any game or hares by night, *i.e.*, (sect. 5) from the expiration of the first hour after sunset to the beginning of the last hour before sunrise. And the Ground Game Act⁴⁶ enacts that ‘ no person having a right of killing ground game [hares and rabbits] under this Act or otherwise, shall use any firearms for the purpose of killing ground game ’ within the same hours. This enactment springs from considerations of public policy.⁴⁷ The penalty is a fine not exceeding £2.⁴⁸ The prohibition does not extend to the shooting of winged game.

Muirburn.

A number of old statutes regulating muirburn,⁴⁹ which were apparently intended only for the protection of growing crops, are superseded by a subsisting Act, passed in 1773, for the preserva-

⁴¹ 27 & 28 Vict. c. 115 (1864).

⁴² See *Daniel v. Janes*, 2 C.P.D. 351.

⁴³ *Supra*, p. 414.

⁴⁴ 11 & 12 Vict. c. 30.

⁴⁵ As to which see the Gun Licence Act, 33 & 34 Vict. c. 57, sect. 2.

⁴⁶ 43 & 44 Vict. c. 47, sect. 6.

⁴⁷ See obs. in Brown and in Fraser in the passages cited, *supra*, ³⁹.

⁴⁸ See *infra*, p. 429, as to interdict.

⁴⁹ Stat. Rob. III. c. 2; 1424, c. 20; 1477, c. 75; 1493, c. 48; 1535, c. 11; 1685, c. 30. See 6 Geo. III. c. 32, and the English Act, 4 & 5 Will. III. c. 23.

tion of game in Scotland.⁵⁰ By sect. 4 it is enacted that every person making muirburn, or setting fire to any heath or muir in Scotland, from the 11th of April to the 1st of November in any one year, shall forfeit and pay 40 shillings for the first, £5 for the second, and £10 for the third or any subsequent offence, or in default of payment suffer imprisonment for six weeks, two months, and three months respectively. The tenant, possessor, or occupier is deemed guilty unless he prove that the fire had spread from other ground, or was raised on his ground by some other person not in his service or family (sect. 5). By subsequent sections every proprietor of high and wet muirlands, the heath upon which frequently cannot be burned so early as the 11th of April, may, when such lands are in his own occupation, burn the heath upon them at any time between the 11th and 25th of April without incurring any of the penalties specified, and, where such lands are let, the proprietor or his commissioner or factor may by writing previously recorded in the Sheriff-Court books, authorise the tenant to do the same.⁵¹ It is settled that the word 'muir' is descriptive of the ground and not of its peculiar vegetable products, and that setting fire to any growth on muir ground, as grass, whin, bent, or broom (and not heather only) is struck at by the Act, the only practical test being, that it must be a place which moor game frequent for breeding.⁵²

There should be express regulation of muirburning in the leases Regulation. both of the pastoral and of the game tenants, for though experience has shown that a judicious course of gradual burning is a common benefit to both, yet it is not easy to find any principle in our law which would prevent the tenant of the land from destroying the whole or the greater part of the heather on his farm in one season, as *bonâ fide* believing it to be for his interest, or being desirous to make an experiment, or even out of malice against his landlord. It would be difficult to find any precedent in the 'rules of good husbandry.' A case in which damages were awarded to a landowner against the holder of a servitude of pasturage over his land for extensive muirburn has no analogy.⁵³ The doctrine of *emulation* has never obtained a secure footing in our law. And the statutes above mentioned do not apply to questions between landlord and tenant. It may thus be difficult for a landlord to regulate muirburn without express stipulation, where his only immediate or tangible interest is the preservation of

⁵⁰ 13 Geo. III. c. 54 ; see preamble.

78.

⁵¹ Irvine, 106 ; Rankine, 141.

⁵³ Robertson v. D. Athole, 1815, 6 Pat.

⁵² Rodger v. Gibson, 1842, 1 Broun

135.

game. It would probably be different, however, if he were able to show the certainty or strong probability of deterioration of the farm at the termination of the lease. How far the possibility of a premature termination, as by bankruptcy, might give him an interest may be questioned. In a case between landlord and tenant, the lease of a pastoral farm prohibited the tenant from burning heath or muir, and reserved to the landlord the sole and exclusive right to burn the heath or heather without making compensation for damages.⁵⁴ The heather was burnt, and an action of damages was raised by the landlord against the tenant, bearing that many acres of heather had been consumed, comprising some of the most valuable covers and beats, and that the value of his property under shooting leases had thus been greatly deteriorated. In adjusting issues the main question was how they might be framed so as to raise the question of the tenant's liability for the acts of his servants and dependents. The form fixed on was, whether the defender on a certain day, in violation of the provisions of his lease, did, by himself or by another or others, set on fire a portion of the muir (the pursuer's property), to the loss, injury, and damage of the pursuer.⁵⁵

II. THE RIGHTS AND OBLIGATIONS OF OCCUPIERS OF LAND IN QUESTIONS WITH THEIR LANDLORD AND HIS GAME TENANTS.

Fundamental
rules.

The relation of landlord and tenant in regard to wild animals—and especially to game—found upon lands under lease is based on three fundamental propositions,—viz., (1) That by the law of trespass no one is entitled to enter lands (except for some purpose which involves a paramount public duty) without the owner's permission, expressed or implied; (2) that, if lands are let for a limited purpose, they must be used for that purpose alone; and (3) that the right to pursue, kill, and take game is an incident to the ownership of land.⁵⁶ It follows that a landowner may prevent all persons from pursuing, killing, or taking

⁵⁴ See *Hamilton v. Campbell*, 1869, 6 Sc.L.R. 426; *Grierson v. Kerr*, 1870, 7 Sc.L.R. 640.

⁵⁵ *Grant v. Gentle*, 1857, 19 D. 992, 29 Sc. Jur. 456. In questions with neighbours, the criterion of the necessary care in performing this lawful (and even necessary) operation is 'that which a prudent man will observe in his own affairs, and which a prudent and con-

'scientious man will observe as to the interests of his neighbours,' *per* L. Neaves in *Mackintosh v. Mackintosh*, 1864, 2 M. 1357, 1362.

⁵⁶ The authorities for the first and third propositions are collected in Rankine, *Landownership*, 123, 130. The second proposition belongs more particularly to the present treatise.

game on his lands, inclosed or uninclosed ;⁵⁷ that, unless there be stipulation to the contrary, the occupier cannot prevent him from making use of his right to pursue, kill, and take game ;⁵⁸ and that this right may be exercised either by the landowner himself or by such persons as have his authority.⁵⁹ The nature of the right is best brought out in connection with this authority, when granted in the form of a lease of game, as will be set forth below. Meantime attention will be called to the relation of the landlord and the occupier of the land in regard to wild animals and especially game.

An ordinary lease of agricultural or pastoral lands is granted and taken for the limited purposes of agriculture or pasture or both. Consequently the right of pursuing, killing, and taking game⁶⁰ or fish of any kind⁶¹ is reserved to the landlord *ex lege* without a special clause in the lease. The tenant is entitled neither to take the game or fish, nor to scare them away, nor to use lawful contrivances in such a way as to injure the landlord's right. Thus, where a tenant, for the purpose of keeping down an alleged overstock of game, sent muzzled dogs over his farm, employed men to go about discharging blank cartridges from guns, and set rabbit snares (which he was entitled to set) in such a way as to destroy game, these proceedings were interdicted, the proper remedy being an action of damages.⁶²

At common law—game impliedly reserved in farm lease.

One limitation has been admitted to the right of a landlord to pursue game over his own land. A house was let as a villa along with eleven acres of enclosed ground of which six acres were usually in tillage and the remainder in grass and pleasure ground. Friends of the landlord, with his leave to sport over his property, followed game with harriers through newly sown grass, part of this patch of ground. Damages were found due in an action brought against one of them. The same Judges would undoubtedly have reached the same result if the damage had

Not in policies.

⁵⁷ Cr. 2.8.13 ; St. 2.3.76 ; Bankt. 2.1.7 ; Ersk. 2.6.6 ; B. Pr. 949 ; Watson v. E. Errol, 1763, M. 4991 ; M. Tweeddale v. Dalrymple, 1778, M. 4992, Hailes 790, 5 B.S. 475 ; E. Breadalbane v. Livingstone, 1790, M. 4999, Hailes 1084, aff. 3 Pat. 221.

⁵⁸ Ersk. *supra*, ⁵⁷ ; B. Pr. 953, 1224, 1226 ; Ronaldson v. Ballantyne, 1804, M. 15270 ; E. Hopetoun v. Wight, 17th Jan. 1810, F.C. 507, and case of M. Tweeddale v. Somner, *there*.

⁵⁹ Though not having the landed qualification—Trotter v. M'Ewan, 8th July

1809, F.C. 406.

⁶⁰ Cases as to leases of game, *infra*, p. 430. It has never been decided whether or to what extent the reservation goes beyond the animals enumerated in the Night Poaching Act, *supra*, p. 414 ; but see the definition in the Act of 1877, *infra*, p. 426.

⁶¹ Maxwell v. Copland, 1868, 7 M. 142, aff. 9 M.(H.L.) 1, L.R. 2 Sc. Ap. 103 (trout in pond).

⁶² Wemyss v. Gulland, 1847, 10 D. 204.

been done by the landlord himself. For the ground of judgment was that 'the spot was allotted for the residence of a family.'⁶³ Whatever doubt may be felt as to the extension of the appurtenances of the residence in the particular case, it will hardly be questioned that the principle is sound and would be properly applied so as to prevent a landlord or persons in his right from entering a lawn, shrubbery, orchard, garden, back-green, or yard adjacent to a dwelling-house let to a tenant.

Vermin. All the wild animals, other than game and fish, which are found on a farm are from the occupier's point of view vermin, or, being innocuous and of little value, are at his disposal except in so far as they are protected during a close time by the Wild Birds Protection Acts.⁶⁴ Rabbits are not game⁶⁵ and are vermin,⁶⁶ which, at common law, the tenant is entitled to destroy in so far as necessary for the protection of his crops⁶⁷—an empty limitation. If he has right of pasturage in plantations he may for that end destroy rabbits there, so long as he uses means by which game is not caught.⁶⁸ Foxes may be pursued and killed by a tenant or others with him or by his permission on his farm, and, if it be necessary for the protection of his stock, even beyond its boundaries, subject to liability for damage done in the pursuit of alien fences.⁶⁹ Wood-pigeons are probably vermin,⁷⁰ and are at anyrate at the mercy of the tenant. If a landlord desires to have a voice in the management of a rookery, he should make special stipulation in the lease of the farm on which it is situated. If he does not, there seems to be nothing to prevent the tenant from extirpating fowls which, according to a plausible theory, do more harm than good when collected in large numbers. No one doubts

Rabbits.

Foxes.

Wood-pigeons.

Rooks.

⁶³ *Grahame v. McKenzie*, 1810, Hume 641 (the judgment was partly based on threats and intemperate language having been used by the defender).

⁶⁴ *Supra*, p. 413.

⁶⁵ *Moncreiff v. Arnott*, 1828, 6 S. 530. See *North v. Cumming*, 1864, 3 M. 173; *Porter v. Stewart*, 1858, 3 Irv. 57; *Inglis v. Moir's Trs.*, 1871, 10 M. 204; and the old Act as to 'cunningaires' (warrens), 1474, c. 60. The Act 1457, c. 88, is in desuetude. They are protected by the Day Trespass Act, by the Prevention of Poaching Act of 1862 (25 & 26 Vict. c. 114), and by the Night Poaching Act, against being killed (sect. 1), and against being pursued by three or more persons together (sect. 9).

⁶⁶ *Gosling v. Brown*, 1878, 5 R. 755 (Gun Licence Act), *supra*, p. 417.

⁶⁷ *Per* L. Rutherford Clark and L.J.-C. Moncreiff in *Fraser v. Lawson*, 1882, 10 R. 396, 406, 412.

⁶⁸ *Cunninghame v. Webster*, 1867, 3 Sc.L.R. 327.

⁶⁹ *Colquhoun v. Buchanan*, 1785, M. 4997. It was the custom of the country. See English cases cited in *Paul v. Summerhayes*, 4 Q.B.D. 9, where it was decided that fox-hunters for sport may be stopped entering land by the owner. The same right would be recognised as belonging to the tenant in protection of his crop and fences.

⁷⁰ *Supra*, p. 417.

that the landlord and his friends and game tenant may lawfully kill wild animals other than game in the course of pursuing game; but it may be fairly questioned whether they can claim a day's rook-shooting as matter of right. It has been held that a tenant is not entitled to destroy the tame pigeons of his landlord (or probably of any one) who holds a qualified dovecot, though it be more than six miles off, though the owner refuses to herd them off, and though they are destroying the tenant's seeds.⁷¹ Tame pigeons.

The common law rights of landlord and tenant are usually altered by stipulation in the lease and have been affected by recent legislation. The usual stipulation is an express reservation of rabbits along with the game. The recent Acts are the Game Laws Amendment (Scotland) Act, 1877,⁷² and the Ground Game Act, 1880.⁷³ Rights as affected by stipulation and statute.

A conflict of interest arises when a tenant observes or believes that injury is being done to his crops by the game or by the game and rabbits (as the case may be) to which his landlord has *ex lege* or by agreement a reserved right. The common law rule was laid down by Lord Fullerton in a passage which has subsequently been frequently recognised as an apt definition. 'A tenant may have a claim of damage for the injury done by game, but in order to support such a claim it is necessary to prove not merely a certain visible damage arising from game, but a certain and visible increase of the game and a consequent alteration of the circumstances contemplated in the contract, imputable to the act of the landlord. The true ground of damage seems to be, not that the game is abundant, but that its abundance has been materially increased since the date of the lease, in consequence either of the active measures of the landlord or his failure to keep down the burden—which last circumstance must be held as equivalent to his act, as the right so to keep it down is one expressly withheld from the tenant.'⁷⁴ In the case from which this *dictum* is cited, the landlord was held not to be liable for damage done by pheasants, where they were introduced for the first time and had increased in numbers through a system of hand-rearing prior to the commencement of the lease, and hand-rearing had ceased Damage from game or rabbits.

⁷¹ *Easton v. Longlands*, 1832, 10 S. 542; 1617, c. 19, and other Acts referred to in *Irvine* 23, *Rankine*, 129. The law of dovecots squares ill with modern notions.

⁷² 40 & 41 Vict. c. 28.

⁷³ 43 & 44 Vict. c. 47.

⁷⁴ In *Drysdale v. Jameson*, 1832, 11 S. 147, 149; cf. *L. Barcaple's charge* in *Syme v. E. Moray*, 1868, 5 Sc.L.R. 272. (Excessive and unreasonable amount of game, *i.e.*, such as to a very great extent to be destructive of the agricultural use of the land).

before complaint was made.⁷⁵ In strong contrast, compensation was found due in a later case for damage done through an excess of game created by artificial means (hand-rearing, winter-feeding, destruction of vermin, and collecting brushwood for cover), which had been adopted subsequently to the date of the lease.⁷⁶

Abandonment
of claim.

The tenant will not be readily held to have cut himself out of his right to claim compensation in such circumstances by a self-denying clause in his lease, however strongly worded. Thus where a lease reserved to the landlord all game, hares, rabbits, &c., with the exclusive liberty of hunting and shooting on the premises, 'without being liable to compensate the tenant in respect of the reservation and liberty herein expressed,' it was held that this clause could not be read as excluding all liability on the part of the landlord caused through increase of game and rabbits, and that, though it might be inferred from the terms of the lease (which contained a stipulation for power to resume land for planting) and the situation of the farm (which was a high pasture farm) that the parties contemplated an increase, compensation would have been due if an increase going beyond what was contemplated and therefore extravagant, had been made out.⁷⁷ In conformity with this view, it was later determined that a clause conceived in terms so sweeping as 'that the tenant shall have no claim whatever for any damage he may sustain from game, hares, or rabbits, this being held to have been calculated upon and allowed for by him in offering for the farm,' does not exclude an inquiry into the existence and amount of damage.⁷⁸ Of course, the tenant can have no claim for damage by game or rabbits which he is at full liberty and has ample facilities to destroy, either during the full subsistence of his lease, or during the period between Whitsunday and separation, when his waygoing crop is still on the ground,⁷⁹ unless he can show that he was prevented from so protecting his crop⁸⁰ or that the game or rabbits bred in plantations which he had no right to enter.⁸¹

⁷⁵ The usual clause obliging the tenant to warn off sportsmen and others, though founded on, does not seem to enter into the essence of the judgment.

⁷⁶ *Wemyss v. Wilson*, 1847, 10 D. 194; followed in *Broadwood v. Hunter*, 1855, 17 D. 340, 1139. See 18 D. 574 as to expenses. Issues there and in *Syme v. E. Moray*, 1868, 6 M. 217; and *Milne v. E. Dalhousie*, 1868, 5 Sc.L.R. 268.

⁷⁷ *Morton v. Graham*, 1867, 6 M. 71 (the tenant failed in the proof); and see

Kidd v. Byrne, *infra*, ⁸⁸ ('without liability for damages').

⁷⁸ *Cadzow v. Lockhart*, 1875, 2 R. 928; 3 R. 666.

⁷⁹ *Wood v. Paton*, 1874, 1 R. 868 (rabbits).

⁸⁰ *Ibid*.

⁸¹ *Inglis v. Moir's Tutors*, 1871, 10 M. 204 (the plantations had been greatly increased during the lease); see *Morton v. Graham*, *supra*, ⁷⁷, as to planting.

A tenant, moreover, is not entitled at the termination (or, it is suggested, at any period) of his lease, after paying his rent regularly or full without reservation, to set up a claim of damages for injury through game or rabbits for a number of years bypast, if he can only found on mere grumbling at his losses and on ineffectual proceedings, not on any serious complaint or claim for compensation. His claim is restricted to the injury caused in the year preceding the suit or earliest effective demur.⁸² But the principle of this case does not extend to the barring of claims specifically lodged each year.⁸³

The question of liability becomes more involved when the game tenant is called into the field, either along with the land-
Liability of sporting tenant.
 lord by the agricultural tenant or by the landlord himself in an action of relief. It is clear, that there being privity neither of estate nor of contract between the two tenants, the one cannot be made liable for damage done to the other unless there be delict. Illustrations have been figured : If the game tenant treads down the farm tenant's corn or breaks the fences, or prevents the latter wrongously from protecting his crops, as by shooting rabbits if he has a right to do so ; or on the other hand if the farm tenant encourages his dogs or hinds to scour the covers to the injury of the game, these are positive wrongs giving rise to actions of damages *hinc inde*.⁸⁴ But the one may let the rabbits alone with the effect of increasing the stock and destroying the farmer's crops ; and the other may let the other vermin alone and so damage the game ; there is no mutual obligation *ad faciendum*.⁸⁵ Therefore where a farm tenant sued both his landlord and the game tenant for damages caused by rabbits which bred in young plantations reserved, the latter went free on showing that he had done nothing to increase, and somewhat to diminish the stock of rabbits.⁸⁶ A claim of relief was given effect to in the following circumstances. The farm lease reserved to the landlord the sole right to the game, rabbits, and hares without liability for damages. This was held to mean a right to keep up a fair sporting stock, not such a stock as required to be kept down by trapping and netting. The game lease bound the game tenant

⁸² *Broadwood v. Hunter*, 1855, 17 D. 340, 1139, 18 D. 574. The principle of this and other cases is treated, *supra*, pp. 390, 400.

⁸³ *Hardie v. D. Hamilton*, 1878, 15 Sc.L.R. 327 (action only after seven years).

⁸⁴ *Per* L.J.-C. Moncreiff in *Inglis v.*

Moir's Tutors, *supra*, ⁸¹, at 10 M. 206.

⁸⁵ *Ibid.* and *per* L. Neaves, p. 210.

⁸⁶ *Ibid.* In England a direct action by the agricultural against the game tenant is allowed for damage from overstocking with game—*Farrer v. Nelson*, 15 Q.B.D. 258. This would not be competent in Scotland : see next case.

to maintain 'a fair stock of game and rabbits,' and to have such a stock at ish. This was held to mean an obligation not to diminish the stock, not an obligation to refrain from increasing it. The facts were that, more by accident than anything else, the rabbits on the farm were allowed to increase to a large extent and did a deal of damage to the farmer's crops. The actions were two : the first brought by the farmer⁸⁷ against his landlord, in which, after a proof, the defender was found liable in damages and expenses; the second for relief by the landlord against his game tenant, in which, after proof taken at the same time (though the actions were not conjoined), the defender was found liable for these damages and expenses, and the expenses of the defender in the first and of the pursuer in the second action, including the expenses in the Inner House.⁸⁸ And the rule of the earlier case of *Inglis* was confirmed, that when the game tenant does not individually come into contact with the agricultural tenant, he has nothing to do with the arrangements between the latter and his landlord, whatever be the priority of the lease in date. The game tenant's liability for damages sprang from the implied condition in his own lease that the stock should not be unduly increased.⁸⁹

Game Act,
1877.

Thus standing the common law, it is obvious that much difficulty must be experienced in proving the amount of game or rabbits at the commencement of the lease, that being a necessary factor in the question where there has or has not been such an increase as involves liability for damages on the part of the landlord or his game tenant. The leading sections of the Game Laws Amendment Act, 1877,⁹⁰ are intended to overcome this difficulty. The Act is printed in the Appendix, and, in so far as it has not been already referred to,⁹¹ may be here explained in a very few words.⁹² The Act (in that part of it now in question) relates only to leases made subsequently to 1st January 1878 (sects. 2, 4, 5, 12) for a term not less than two years, and to the lessors and lessees therein, and persons in their right (sect. 3). 'Game' is interpreted in such a way as to include bustards, grouse, black-game, landrail, partridges, pheasants, quail, snipe, wild duck, woodcock, deer, hares, and rabbits⁹³ (sect. 3 and Sched. I).

⁸⁷ There were two farmers ; but it is simpler to take one of them only.

⁸⁸ *Kidd v. Byrne*, 1875, 3 R. 255.

⁸⁹ *Per* L.J.-C. Moncreiff, pp. 261, 262.

⁹⁰ 40 & 41 Vict. c. 28 ; *infra*, Appx. No. v.

⁹¹ *Supra*, p. 416.

⁹² The exclusive jurisdiction of the

Sheriff under the Game Acts (sect. 10), and the provision against cumulation of penalties (sect. 11) belong to the general law of game.

⁹³ By a pleonasm, the Act speaks of rabbits, hares, and other game' (sects. 4, 5). Capercaillie, plover, and swans are omitted.

‘Crop’ includes grass whether intended for hay or pasture, except where grown upon muirlands.⁹⁴

If under a lease made after the said date or at common law on land occupied under such a lease, the lessor has the sole right of hunting, killing, or taking rabbits, hares, or other game, or any of them, the lessee is to be compensated for damage done to his crops in each year by them, in excess of a sum set forth in the lease or subsequently agreed to in writing, ‘as the amount of the ‘annual damage for which it is agreed no compensation shall ‘be due,’ or, failing agreement, in excess of forty shillings (sect. 4). The year is reckoned from Whitsunday. The tenant’s intimation of claim must state his intention, failing agreement as to the amount of such excess, or a reference to arbiters, to recover by action under the Act (sect. 5). The procedure by arbitration of an informal kind is set forth (sect. 6). Action at law is barred by failure to give written notice of intention so to proceed—in the case of damage to growing crop, at least three weeks before reaping or raising; in the case of damages to crop reaped or raised, one week before removal; and in case of grass for pasture, fourteen days before any person called as a witness by the lessee to value the damage shall inspect the crop with that view [sect. 7 (1)]. If the amount claimed does not exceed £50, the action must be brought in the Sheriff Small-Debt Court; if it exceeds that sum, in the ordinary Sheriff-Court.

Predetermined maximum of damage not payable.

In as much as most—according to many authorities the whole—of the damage actually done to a tenant farmer by wild animals is the work of hares and rabbits, the value of this statute is diminished or annihilated, with regard to leases of land or game not current on 7th September 1880, by the passing of the Ground Game Act, 1880,⁹⁵ ‘in the interests of good husbandry, and for the better security for the capital and labour ‘vested in the cultivation of the soil.’

Ground Game Act, 1880.

The scope of the leading provisions of the Act⁹⁶ is limited in four ways. They only relate to the right of killing and taking hares and rabbits, together or separately (sect. 8).⁹⁷ They are excluded during the currency of a lease or contract of tenancy⁹⁸ under which an occupier held land at the above date, or of a contract made *bonâ fide* for valuable consideration before that

Its scope.

⁹⁴ See definition of muir, *supra*, p. 419.

(sects. 6 and 7) see *supra*, p. 418, and *infra*, p. 429.

⁹⁵ 43 & 44 Vict. c. 47, printed in Appx. No. vi.

⁹⁷ *Fraser v. Lawson*, 1882, 10 R. 386.

⁹⁸ *E.g.*, A contract for a lease, *Allhusen v. Brooking*, 26 Ch.D. 559.

⁹⁶ As to the more general provisions

date entitling any other person than the occupier to take and kill ground game (sect. 5).⁹⁹ They do not apply to occupiers in virtue of rights of common or of grazing for not more than nine months [sect. 1 (2)]. And in the case of moorlands and unenclosed lands (not being arable lands) they are confined to the period between 11th December and 31st March, both inclusive, unless these lands be detached portions less than twenty-five acres in extent and adjoining arable lands [sect. 1 (3)].

Occupier's
unalienable
right.

Within these limits of subject-matter, time, title, and space, the statute introduces a conspicuous novelty in legislation—a right which is otherwise capable of alienation and is yet made unalienable. The words are:—‘Every occupier of land shall have, as incident to and inseparable from his occupation of the land, the right to kill and take ground game thereon, concurrently with any other person who may be entitled to kill and take ground game on the same land’ (sect. 1). The inalienability of this right is guarded by a provision voiding every agreement, condition, or arrangement which purports to divest or alienate it, or gives the occupier any advantage in consideration of his forbearing to exercise it, or imposes any disadvantage in consequence of his exercising it¹⁰⁰ (sect. 3). An occupier entitled otherwise than under the Act to kill and take ground game, in giving to any other person a title to do so, retains nevertheless the right conferred by the Act; and rights more extensive are saved (sect. 2).¹⁰¹

Mode of
exercise.

There are certain limitations on the mode in which the occupier's statutory right may be exercised. He shall kill and take ground game only by himself or by persons duly authorised by him in writing,¹⁰² under these conditions—(a) that he and one other person so authorised shall be the only persons entitled to use firearms;¹⁰³ (b) that no person shall be authorised by him, except members of his household resident on the land in his occupation;¹⁰⁴ persons in his ordinary service on such land; and

⁹⁹ See *per* L. Adam in *Fraser v. Lawson*, 10 R. 410. The first part of this section applies to England, where at common law game goes to the tenant, Woodfall, 718. As to franchises, see Irvine, p.133.

¹⁰⁰ What of the case of an owner-occupier, who lets the whole of the ground game, and either continues to keep the land in his own hand or lets it to a farming tenant?

¹⁰¹ See *per* L. Adam in *Fraser v. Lawson*, *supra*, ⁹⁷, 10 R. 409. It does not, therefore, prescribe the conditions under

which ground game may be destroyed (here a servant had no written authority) where the tenant has a common law right, *Jack v. Nairne*, 1887, 24 Sc.L.R. 350.

¹⁰² It perhaps need not, but certainly ought to, be signed.

¹⁰³ Not including air-guns, which are specially mentioned in the Gun Licence Act (33 & 34 Vict. c. 57, sect. 2), which was in the mind of the legislature in passing the present Act (see sect. 4).

¹⁰⁴ Including a friend asked to stay a week and shoot rabbits—*per* L.J.-C.

any one other person *bonâ fide* employed by him for reward in the taking and destruction of ground game; and (c) every person so authorised, on demand by a person holding the concurrent right, or any person authorised by him in writing¹⁰⁵ to make such demand, shall produce the document by which he is authorised, and in default shall not be deemed to be an authorised person [sect. 1 (1)].

As has been already mentioned, the statute contains certain more general provisions which now claim attention. Associated with provisions against the use of firearms by night and the employment of poison (both conceived in the public interest)¹⁰⁶ there is a provision 'that no person having a right of killing ground game under this Act or otherwise . . . shall, for the purpose of killing ground game, employ spring traps except in rabbit holes, and any person acting in contravention of this section shall on summary conviction be liable to a penalty not exceeding two pounds.'¹⁰⁷ The purpose of this provision is to protect the landlord's, or the game tenant's, concurrent right under the statute and their right to pursue and kill winged game, against the injury to hares, winged game, and sporting dogs,¹⁰⁸ which would inevitably follow on the setting of traps outside rabbit holes. Proceeding on this view, it was first determined in a complaint for breach of interdict, brought by a game tenant against a farm tenant, that the traps must be set within the roof of the holes, not outside in the scrape,¹⁰⁹ the tenant being in this way neither better nor worse off than at common law;¹¹⁰ and later (in an interdict brought by the landlord), that a scrape made under a wire netting used as a fence, and roofless except in so far as it is covered by the base of the netting, is not a rabbit hole in the sense of the statute.¹¹¹ The

General provisions.
Spring traps.

Moncreiff and L. Young in *Stuart v. Murray*, 1884, 12 R. (Just.) 9—the purpose being to insure respectability. As to a dog-trainer, see *Vere v. Mackintosh*, 1885, 1 Sh. Ct. Rep. 63.

¹⁰⁵ The writing is a formality not required by the Night Poaching, Day Trespass, or Game Licence Acts—9 Geo. IV. c. 69, sect. 2; 2 & 3 Will. IV. c. 68, sect. 2; 23 & 24 Vict. c. 90, sect. 10.

¹⁰⁶ *Supra*, p. 417.

¹⁰⁷ 43 & 44 Vict. c. 47, sect. 6. As to the correlation of this section and the Day Trespass Act, see *Gammell v. Winter*, 1885, 1 Sh. Ct. Rep. 355.

¹⁰⁸ *Per* L.P. Inglis in *Brown v. Thom-*

son, 1882, 9 R. 1183, 1188. His lordship also suggests danger to foxes and hounds in a fox-hunting country, p. 1189.

¹⁰⁹ *Brown v. Thomson, supra*,¹⁰⁸. This mode of trapping is feasible and usual, and alone preserves the rights of both parties.

¹¹⁰ *Per* L.P. Inglis, *ibid.* p. 1191; and see *Wemyss v. Gulland, supra*, p. 421.

¹¹¹ *Fraser v. Lawson*, 1882, 10 R. 396 (*diss.* L. Young). The same result would, according to the view cited in last note, have been reached at common law, yet *dicta* in the opinions point to a loss of right to the tenant through the Act without equivalent.

section is general and retrospective in the sense that the limitation in sect. 5 to occupiers and others holding under contracts made after the passing of the Act does not apply to it, the words 'or otherwise' being construable in no other way. Therefore the prohibition in question was held to apply to the tenant of a farm under a lease dated prior to the Act, and containing no reservation of rabbits to the landlord.¹¹²

Complaint by
sporting tenant
under the
Game Acts.

It will be convenient to take up here the only other general provision of the Act which remains to be noticed, though it more properly belongs to the next part of this chapter. It is contained in the seventh section, which (shortly stated) gives to a non-occupier having the sole right of killing game (with the exception of the statutory concurrent right of the occupier) the same authority to institute proceedings under any Act authorising the same as if he were *owner* of an exclusive right to game. This enactment has been thus paraphrased: 'Considering that 'a person who is in occupation of land is clearly one who may 'complain, it is desirable to extend that right to a person who, 'though not in the occupation of the land, is the representative 'of the landlord in his right to kill game.'¹¹³ It implied, therefore, the right of a farm tenant, who had also an exclusive right to the game, to prosecute under the Day Trespass Act, though he described himself in the complaint as 'tenant' only; and he was, therefore, protected against an action of damages for unjust prosecution by the finality clauses of that Act, and of the Summary Procedure Act, under which the complaint was brought.¹¹⁴

III. LEASES OF GAME AND FISHINGS.

Title to grant
leases.

Since no one can grant a lease of more than he himself has in right, the lessor must be one who, as owner of the land over which the right has to be exercised, or of the fishery in question, or as the holder of some franchise or reserved right, has an exclusive or concurrent title to the game or fishings, communicable to others. The holder of a servitude of pasturage has no such right.¹¹⁵ One of several proprietors in a commonalty cannot, without the consent of the others, grant a liberty to shoot by a lease for rent, though he may probably be entitled to shoot over it himself, or even gratuitously to grant permission to others.¹¹⁶

Servitude.
Commonalty.

¹¹² Ibid. (*diss.* L. Rutherford Clark).

¹¹³ *Per* L.P. Inglis in *Ferguson v. M'Nab*, 1885, 12 R. 1083, 1088.

¹¹⁴ Ibid. ; 2 & 3 Will. IV. c. 68, sects. 1, 2, 17 ; 27 & 28 Vict. c. 53, sect. 35.

¹¹⁵ *Forbes v. Anderson*, 1st Feb. 1809, F.C. 121.

¹¹⁶ *Campbell v. Campbell*, 24th January 1809, F.C. 100.

Where any land or fishery is held by joint or common proprietors, the lessee should take care that his lease is signed by all of them or by their authorised agent. The transmissibility of a reserved right depends wholly on its terms. Thus, a *jus aucupandi* over a forest, the property of another, is probably incapable of being farmed out or converted into a means or engine of profit or advantage, though it will entitle the holder to exercise the right personally or through his gamekeeper or through his friends, either in his presence or not, so long as the right is fairly exercised over against the owner's right of stalking and his concurrent right of fowling.¹¹⁷ Two cases relating to salmon fishings stand in strong contrast to each other. In the one, the owner in letting these reserved 'to himself and his heirs and successors, and to the proprietor of the lands of L and to those having their authority,' the right of angling with the rod in a river and loch named and all streams connected therewith. The catch was to belong to the lessee. This reserved right was held to be communicable by lease.¹¹⁸ In the other, the proprietor of a riparian estate sold the salmon and other fishings in the river, 'reserving always to me . . . and my successors in the said lands and estate of O the privilege of fishing with the rod for our amusement only.' This was held, in the absence of proof of more extensive use, to be a privilege personal to the proprietor of O for the time being, and one which he was not entitled to delegate or communicate to any other person.¹¹⁹

Common owners.
Transmissibility.

Of salmon fishings.

A temporary right to kill and take game and other wild animals may take one of three different forms. It may be a lease of land out and out, the known use of the land intended by both parties being only or mainly the harbouring and sustenance of game, such as deer. It is now established that this exclusive right is to be regarded in every respect¹²⁰ as a lease of land—the nature of the stock to be bred on it being of no consequence—and therefore to be valid against singular successors, such as succeeding heirs of entail.¹²¹ This was decided in a case where an heir of

Forms of sporting leases.

Lease of land.

¹¹⁷ *E. Aboyne v. Innes*, 22nd January 1813, F.C. 384, aff. 6 Pat. 444; esp. *per* L.J.-C. Boyle, 391. L. Glenlee's proposed exception (p. 393) in favour of the tenant of the lessor's mansion-house has been justly controverted—1 Hunter, 323; Irvine, p. 37. The point did not arise in *Carnegie v. L. Kintore*, 1829, 8 S. 251, where there was a reserved right of shooting to two persons, their families, and persons residing with them.

See a reservation of deer—*Hemming v. D. Athole*, 1883, 11 R. 93.

¹¹⁸ *Gemmell v. Riddell*, 1847, 9 D. 727.

¹¹⁹ *D. Richmond v. Duff*, 1867, 5 M. 310. The distinction is plain, though fine, but *Gemmell's* case seems to have escaped observation. There was no pretension to lease the right.

¹²⁰ Could the deer be gathered, sequestrated, and sold under hypothec?

¹²¹ *Farquharson*, 1870, 9 M. 66.

entail in possession petitioned the Court for authority to grant to trustees for her Majesty a long lease of certain lands, 'together with the timber, woods, and plantations thereon, and with full and exclusive right to occupy and possess the said lands, and to shoot, hunt, and sport, and to kill deer and game thereon.' The land was a pure forest incapable of being occupied profitably for any other purpose than sporting. The power was granted.¹²² Whether the same rule would apply to the more ordinary form of a deer forest lease—which lets the privilege of sporting only and not the lands themselves—on the ground that the possession is really exclusive, has never been determined; but the tendency of modern decisions is towards the affirmative.¹²³ A forest frequented in the shooting season not by stags but only by hinds, is not a deer forest in the only sense in which the term could properly be used in an advertisement; and it was decided that the question of its real nature could not be shut out by the fact that the lessee, before closing with the offer to let, had sent his gamekeeper to visit the ground.¹²⁴

Rabbit-catching.

Another temporary right is obtained by the rabbit-catcher who contracts with the person entitled to destroy the rabbits, to trap them at his own risk, paying for the privilege a rent or royalty. Nothing has been done by our Courts in elucidation of the rights and obligations of these parties.

Ordinary game lease.

Intermediate between these extremes is the game lease proper. There is no exclusive possession of the corporeal subject—land; therefore the lease runs thus: 'The exclusive right to the shootings on the estate of X, but without prejudice to such right as the tenants and farmers on the said estate may have by statute or at common law to kill hares and rabbits for the protection of their crops, and subject to any provisions in existing leases relating thereto.' With this right, there may be let a dwelling-house and offices; the rod-fishing for salmon in a river; and right to fish in lochs. Arrangements are usually made for the services, payment, and dismissal of servants, and the use and maintenance of the garden, furniture, and boats. The tenant is taken bound not to unduly increase the game on the lower and arable lands; to relieve the lessor of claims of damages made by the agricultural tenants; not to unduly reduce the stock of game, 'but to shoot and kill the same in a fair and sportsmanlike manner, and leave a fair average stock of game on all parts of

¹²² The second difficulty in the case is noticed, *supra*, p. 64.

¹²³ *Infra*, p. 434; 1 Jur. Styles, 702.

¹²⁴ *E. Wemyss v. Campbell*, 1858, 20 D. 1090.

'the estate at the termination of the lease, excepting always such reduction as may be shown to have been the result of disease over which he had no control,'—as fixed in case of dispute, by arbitration.¹²⁵

Considerable controversy has raged round the question whether the leading right thus granted out is to be regarded as the delegation, assignation, or communication of a personal privilege, incident to the ownership of land, yet communicable by the owner to others;¹²⁶ or as a right of occupation of land for a particular purpose, limited no doubt, but no more so in essence than the right of a farming tenant to possess for the purposes of agriculture. On the one hand, the rule has long been recognised that game leases are not valid in questions with singular successors of the lessor.¹²⁷ From the nature of the subject let hypothec is inconceivable. But a game lease could only become a real right by a strain which even a statute so flexible as the Act 1449, c. 17, could scarcely be expected to bear; and hypothec is not of the essence of a true lease. On the other hand, the return made by the game tenant, and known universally as rent, has been made to play all the parts which the law expects the rent of land to perform. It is computed in estimating the amount of a widow's provision under her marriage contract;¹²⁸ in settling the free rent of an entailed estate available for provisions;¹²⁹ in fixing the amount of a widow's locality lands;¹³⁰ in making up the valuation roll;¹³¹ in assessing for poor-rate against either landlord or tenant;¹³² in making up the electoral roll;¹³³ and lastly, in estimating the amount of the composition due by a vassal to his superior.¹³⁴ In some of these cases, buildings were let along with the sporting rights, but in principle the circumstance is of no relevance, since the incorporeal was in each case the principal right, and the other merely accessory. Further,

Confers right of occupation for land for a limited purpose.

¹²⁵ 1 Jur. Styles, 699. For adaptations to the Ground Game Act see Appx. Nos. xiii., xiv. hereto.

¹²⁶ B. Pr. 952, 953; and cases in next note.

¹²⁷ Pollock, Gilmour & Co. v. Harvey, 1828, 6 S. 913; Birkbeck v. Ross, 1865, 4 M. 272; per L. Chan. Hatherley in Campbell v. M'Lean, 1870, 8 M. (H.L.), 44; L. Kinloch alone maintains the contrary, Farquharson, *supra*, ¹²¹, at 9 M. 75; and see per L. Ardmillan in E. Fife's Trs. v. Wilson, 1859, 22 D. 191.

¹²⁸ M'Pherson v. M'Pherson, 1839, 1 D. 794, aff. 5 B. App. 280, 5 D. 651;

Sinclair v. L. Duffus, 1842, 5 D. 174.

¹²⁹ Cases in last note; Leith v. Leith, 1862, 24 D. 1059.

¹³⁰ Menzies v. Menzies, 1852, 14 D. 651, 17 D. 1090, var. 23 D. (H.L.) 16.

¹³¹ 17 & 18 Vict. c. 91, sect. 42; D. Montrose, 1863, 1 M. 1197.

¹³² Crawford v. Stewart, 1861, 23 D. 965.

¹³³ Paterson v. Johnston, 1879, 7 R. 17, overruling Dawson v. Watson, 1869, 8 M. 10, and displacing *dicta* in Girvan v. Campbell, 1875, 3 R. 1; see also Richardson v. Stewart, 1878, 6 R. 17.

¹³⁴ Stewart v. Bulloch, 1881, 8 R. 381.

where sporting rights are not let, the mere capacity of the lands to produce an appreciable, or at least substantial, return in that way, is taken into consideration in estimating the amount of free rent,¹³⁵ in fixing the amount of locality lands,¹³⁶ in computing composition,¹³⁷ and now also in compiling the Valuation Roll, and in assessing for poor rate¹³⁸—in other words, in all cases where the question could arise for determination. In view of these judgments the words of L.P. Inglis may be cited as laying down the law as it now stands:—‘If, indeed, it were the law that a ‘a right of shootings was a mere personal franchise—as at one ‘time the Court appeared inclined to hold—there would be a ‘great deal to be said against the application of the words of ‘the statute [1469, c. 36, as to composition] to a lease of ‘shootings; but I think it has now been laid down in a series ‘of decisions that this is not the nature of a right of shootings, ‘but that what the tenant receives under such a lease is a right ‘of occupation of land, as much as in the case of an agricultural ‘tenant. It is for a different purpose, no doubt, but it is not ‘the less a right of occupation; . . . and I know no other ‘species of contract which will include the present except the ‘contract of lease.’¹³⁹

Scope of
game lease.

It has been seen that conflict of interest may arise between agricultural and game tenants, where the scope of the title of each is undoubted. In one case the title was disputed. The question arose between a game tenant and his landlord, but the substantial interest which the latter sought to protect lay with the farm tenants. The landlord after granting a lease ‘of the whole ‘game and shooting of every description’ granted permission to several of the farmers on the estate to destroy rabbits on their holdings. It was held that the lease gave the game tenant the sole right of shooting rabbits to the exclusion of the landlord and of any one alleging an express right from him.¹⁴⁰

Not transfer-
able.

It seems to be a just remark that ‘a lease of shootings implies ‘*delectus personæ* in a sense perhaps more emphatic than almost ‘any other kind of lease.’¹⁴¹ If this be so, it must be incom-

¹³⁵ *Per* L. Brougham in *Macpherson v. Macpherson*, 5 B. Ap. 328; and L. Barcaple in *Birkbeck v. Ross*, *supra*, ¹²⁷.

¹³⁶ *Menzies v. Menzies*, *supra*, ¹³⁰.

¹³⁷ *Stewart v. Bulloch*, *supra*, ¹³⁴.

¹³⁸ 49 Vict. c. 15.

¹³⁹ In *Stewart v. Bulloch*, at 8 R. 383, 384. The decision in *D. Athole*, 1855, 17 D. 1015, that a shooting-lodge is not an entail improvement is displaced by

38 & 39 Vict. c. 61, sect. 3 (7f).

¹⁴⁰ *North v. Cumming*, 1864, 3 M. 173. The case leaves much unsettled.

¹⁴¹ *Per* L. Kinloch in *E. Fife v. Wilson*, 1864, 3 M. 323, 324. The effect of an exclusion of assignees and sublessees was raised but not decided in *North*, *supra*, ¹⁴⁰, the original tenant being himself a party in the case.

petent for the lessee to sublet or assign without the landlord's permission.

A tenant who had an express permission to kill off the whole Warren. rabbits in a warren was held to have no claim against the landlord for a breeding stock which he chose to leave behind at ish.¹⁴²

The usual term of entry to a game lease for a year or years is at Whitsunday. Nothing has been settled though certain sagacious suggestions¹⁴³ have been made as to the mutual rights and obligations of the outgoing tenant on the one hand, and the landlord and incoming tenant on the other, during the period between the close of a shooting season and the Whitsunday following. It is also not uncommon to let shootings for the season or even for shorter periods. There is no rule as to the date of payment of rent. It is usual in the case of Highland (and, it may be added, of other) shootings especially if let for a season only or part of one, to stipulate expressly for the payment of rent beforehand. Where this had not been done and nothing in the shape of a custom was made out, the Court refused a petition brought immediately after the season began for sequestration of the tenant's effects contained in a house let with the shootings.¹⁴⁴ Where a proprietor let *inter alia* 'the exclusive right of shooting over' a grouse moor, . . . 'all as lately occupied by D,' and the rent was paid in advance, the tenant was held entitled to damages on the ground that two of the seven beats were held in common with a neighbouring proprietor, though that had been the case during D's tenancy. The ruling words were 'the exclusive right,' and the decree granted did not interfere with the rule against an *actio quanti minoris*, since it was not the duty of the tenant to throw up the lease when he first heard of the defect the day before the Twelfth.¹⁴⁵ A lease of game does not curtail the landlord's right of dealing with plantations in the course of the ordinary administration of his estate, by thinning, cutting down ripe wood, beating up, draining, making new plantations and the like, so long as he does nothing with the purpose of injuring the game tenant's right.¹⁴⁶

Miscellaneous rules.

Outgoing and incoming tenants.

Rent.

Short measure.

Plantations.

¹⁴² Lockhart v. Cathcart, 1833, 11 S. 339.

475.

¹⁴³ Irvine, 39.

¹⁴⁶ *Gearns v. Baker*, L.R. 10 Ch. 355 ; and see *Pattison v. Gilford*, L.R. 18 Eq. 259 (advertisement of sale of estate).

¹⁴⁴ *Fraser v. Patrick*, 1879, 6 R. 581.

¹⁴⁵ *Critchley v. Campbell*, 1884, 11 R.

PART III.

TERMINATION OF LEASES.

1. REMOVING GENERALLY (Chap. XIX.).
 2. TERMINATION DURING CURRENCY (Chap. XX.).
 3. TERMINATION AT ISH : ORDINARY REMOVINGS (Chap. XXI.).
 4. TACIT RELOCATION (Chap. XXII.).
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CROFTERS HOLDINGS ACT (Chap. XXIII.).

CHAPTER XIX.

REMOVING GENERALLY.

BY far the largest number of questions in the law of leases have arisen in connection with the termination of the contract. Many of these have been merely incidental to the dissolution of the relation of landlord and tenant, and have been treated or will still be noticed more conveniently in other parts of this work. It will be attempted in this and the following chapters to describe the mode in which the contract of lease may be brought to an end. In doing so it will be well to deal in the present chapter with the *generalia* of removings and in the succeeding chapters to adhere as heretofore to the order of time, and to set forth in the first place the modes and circumstances in which a lease is brought to a premature conclusion, or at least to a conclusion earlier than the most remote ish contemplated in the contract; and then to proceed to the cases in which leases run out in the ordinary way.

The technical term for the relinquishment of possession by a tenant is a removing. It may be either voluntary or compulsory. Where the removing is premature (in the above sense), a voluntary removing is the result either of the tenant's taking advantage of a breach of contract on the part of the landlord, setting the tenant free if he desires liberty; or of an agreement between the parties known as renunciation. Of the former mode of terminating the contract many examples have been adduced in the foregoing pages.¹ The law relating to the latter is set forth in the following chapter. A premature removing may also be the result of the landlord's taking advantage of an irritancy legal or conventional. In the stricter sense of the word a removing is the process at law by which a landlord enforces his tenant's obligation to quit possession.² A removing, which is compulsory and

Division of
part.

Nomenclature.

Removing.

Voluntary
removing.

Renunciation.

Action of
removing.

Ordinary and
extraordinary
removings.

¹ See esp. Chaps. x., xvii.

² The meaning of the term 'ejection'

need not be explained here. It is treated of *infra*, p. 494.

Breaks.

withal premature, in the sense of taking effect during the currency of a lease, is known as extraordinary in contradistinction to ordinary removings which take place at the natural ish. In this description of the terminology,³ the tenant's point of view has been maintained. Still retaining the same standpoint, it is obvious that a stipulated break may be either voluntary, or compulsory, or mixed, according as the option to break possession rests with the tenant alone, or the landlord alone, or with each of them.

The general rules which occupy the present chapter may be ranged under three heads.

I. REMOVING (INCLUDING EJECTION) THE EXCLUSIVE REMEDY.

Interdict
incompetent.

A removing (or ejection) is the only legal mode of displacing a sitting tenant. In particular, procedure by interdict or suspension and interdict is incompetent so long as the tenant is in possession. Thus, where a lease had fallen in through the bankruptcy and sequestration of the lessee, and the landlord, while declining to allow the creditors to possess, permitted the bankrupt and a partner whom he had assumed to hold on and pay the rent, it was held incompetent to oust the partners by means of the summary remedy of interdict against further occupation raised by the landlord and the trustee in the original tenant's sequestration.⁴ Similarly, a lease having been forfeited through the bankruptcy of the tenants it was held to be incompetent to interdict them and their trustees from occupying the subjects; the former, because they were in lawful possession and only to be ousted by a removing; the latter, because they pretended no right and showed no intention to enter.⁵ And the question whether there has been an operative obligation to remove at ish, or on the other hand a right in the tenant to continue possession by tacit relocation, can only be tried in a removing, not in an interdict against interference with the subjects and against preventing the landlord from entering—'that being a process only appropriate if the tenant is not in possession.'⁶ But questions arising pending a lease or at its termination, with regard to the use of the subjects may be competently raised in the form of an interdict.⁷ If ejection has taken place, and in

³ It is not exhaustive; but solemn and summary removings will more fitly be noticed farther on.

⁴ *Borrows v. Colquhoun*, 1852, 14 D. 791, rev. 1 Macq. 691.

⁵ *Rankin v. M'Lachlan*, 1864, 3 M.

128,—interim interdict. *L. Benholme* differed on the latter point, but the judgment seems sound.

⁶ *Johnston v. Thomson*, 1877, 4 R. 868.

⁷ *Rankin v. M'Lachlan*, *supra*, ⁵.

spite thereof the tenant returns⁸ or threatens to return⁹ to possession, interdict is the proper remedy. And if third parties allege a legal right to make use of land which is let, the appropriate remedy of the landlord and tenant is interdict.¹⁰

II. TITLE TO SUE.

Different rules apply where the landlord suing an action of removing is, and where he is not, the actual lessor, the party from whom the lessee derived his right.

A. Title of Lessor Himself.

In the former case the pursuer is entitled to sue, however defective his title to the subjects may be; and the tenant has no right to object to that title, nor to invert the possession (*causam possessionis mutare*) for the purpose of evading decree,¹¹ whether the origin of the tenancy be proved by writ or the tenant's oath or by his judicial confession.¹² The rule has been given effect to where the lessor was principal tenant of the subjects;¹³ and also where the lessor at the date of the lease was an undischarged bankrupt, left in possession by his trustee who declined to interfere with the subjects.¹⁴ It follows, moreover, that neither the original lessee nor any assignee of his is entitled to call for production of the lessor's title merely for the purpose of ascertaining whether the lease is a valid security.¹⁵ But the rule does not go so far as to prevent the tenant from producing *prima facie* evidence (a disposition of the property or an assignation of the principal lease, as the case may be) to show that the lessor had denuded himself of his right in the subjects. If, however, there is a dispute as to the existence of such a transfer, the action of removing is not the proper proceeding for trying the question.¹⁶ A disposition *ex facie* absolute though really in security if com-

Cannot be
impugned.

Except on the
ground of
divestiture.

⁸ *Boswell's Trs. v. Pearson*, 1886, 24 Sc.L.R. 32 (a month's imprisonment for persistent breach of interdict by small farmer); *Dalglish v. Henderson*, 1887, Sc.W.N. 83.

⁹ *Baillie v. Mackintosh*, 1882, 19 Sc.L.R. 352.

¹⁰ *Macleod v. Davidson*, 1886, 24 Sc.L.R. 69 (pasturage: claim abandoned).

¹¹ *Balf.* 459; *Cr.* 2.9.20, 28; *St.* 2.9.41; 4.26.8; *Bankt.* 2.9.54; *Ersk.* 2.6.51; *Agnew v. Corcaphie*, 1631, M. 13796 (wadsetter); *Penman v. Martin*, 1822, 1 S. 485 (N.E. 452); *Butter v. M'Donalds*, 1769, M. 11999; *York Buildings Co. v. Carnegie*, 1764, M. 4054; *Stewart v.*

Burns, 1802, *Hume* 568, goes further, if as seems to be the case the lease was not granted by the pursuer.

¹² *Hamilton v. Crawford*, 1583, M. 13784, 14023.

¹³ *Dunlop & Co. v. Meiklem*, 1876, 4 R. 11.

¹⁴ *King v. Wieland*, 1858, 20 D. 960.

¹⁵ *Dennistoun, Macnair & Co. v. M'Farlane*, 1808, M. App. Tack, 15.

¹⁶ *King v. Wieland*, *supra*, ¹⁴; see *Ly. Essilmont v. Tenants*, 1582, M. 13783, 12046; *Maxwell v. Glascock Tenants*; and *Nithsdale v. Tenants*, 1627, M. 13788, 1 B.S. 236.

pleted by infestment is a divestiture sufficient to displace the title to sue;¹⁷ but a landlord does not lose his right of action against his tenant by a mere assignation of the rents to a third party, since he cannot thus without his tenant's consent interpose an intermediate tenancy and convert his tenant's right into one of subtenancy.¹⁸

B. Title of Pursuer who is not the Lessor.

Turning now to the question what sort of a title the pursuer of an action of removing, who is not the original lessor but a third party, must produce, it will be convenient to state in the first place the rules which apply to landlords whose title is not restricted by any concurrent right, and then to proceed to the additional requirements which arise out of limited titles.

1. Title required where Pursuer is Unlimited Owner.

Being an unlimited owner.

Infestment required.

Singular successors.

Exceptions.

The strict rule of law is thus stated by Erskine: 'If a proprietor is to insist against tenants or possessors who derive their right from others, sasine is, by our customs, a necessary title in removing;' ¹⁹ and by Lord Cowan: 'Where an action of removing is brought by a party other than the one from whom the title of the party sought to be dispossessed is said to have flowed, there must be an infestment in the person of the pursuer.'²⁰ This rule, which probably arose out of the feudal jurisdiction of the barons' courts, and may still be of value for the protection of tenants against latent conveyances, can scarcely be arraigned as unnecessarily stringent or inconvenient, now that the process of infestment has been so materially simplified. After considerable fluctuation of opinion on the Bench and in the study,²¹ the rule seems to be fixed,²² and to be open to only two well-established exceptions, viz., where the pursuer's title is by purchase so notorious as in judicial sales (now nearly obsolete),²³

¹⁷ *Traill v. Traill*, 1873, 1 R. 61. The point is left in some doubt in this case, but later views regarding such dispositions tend in this direction.

¹⁸ *Wilson v. Wilson*, 1859, 21 D. 309.

¹⁹ *Ersk.* 2.6.51.

²⁰ In *Traill v. Traill*, *supra*, ¹⁷, at 1 R. 64. Old cases as to the nature of the requisite infestment are reported in M. 570, 1338, 13789, 13793, 13808, 14319; 1 B.S. 239, 261. It is enough, though the infestment be only as 'part and pertinent'—*Ly. Boyn v. Tenants*, 1627, M. 9628.

²¹ Cf. *St.* 2.9.41; *Dank.* 2.9.54; *Ersk.*

2.6.51; *Fountainhall* in 3 B.S. 151; *Paxton v. Hunter*, 1749, M. 16121, with *Ersk.* 2.6.52; *Milne v. Petrie*, 1807, Hume 581, M. Appx. Removing 5, where *Erskine's dicta* are echoed, but the lessor was himself not infest.

²² *Scott v. Fisher*, 1832, 10 S. 284. Yet there was much diversity of view in *Traill v. Traill*, *supra*, ¹⁷; see esp. op. of L. Cowan and L. Neaves.

²³ *L. Adv. v. Ardnarmurchan Tenants*; and *Alexander v. Dornoch Tenants*, 1773, 5 B.S. 571; *Stewart v. Spalding*, 1791, noticed in *Campbell v. McKellar*, 1808, M. Appx. Removing, 5.

and where the conclusion for removing is only ancillary to a declarator.²⁴ But an instance originally defective for want of infestment may be cured by registering the title before the calling of the case.²⁵ Even, during the progress of the cause, time would probably now be given by the Court to get this done when the blot has been detected and founded on.²⁶ If infestment cannot be taken by a purchaser before action of removing is raised by him, it is a competent and advisable course to join the vendor infest with him in the instance.²⁷

The rule requiring infestment applies not only to the case of singular successors of the lessor but also to his heirs,²⁸ subject to the same modifications. The rule could scarcely be gainsaid where the heir possessed, under the old law, on mere apparenay without connecting himself in any way with his ancestor.²⁹ It was ultimately established also in cases where the heir's title was nearly personal, standing on retour or precept of *clare constat*;³⁰ and it would consequently be held to apply to the case of an heir uninfest but possessing, by the force of modern legislation, a personal right by mere survivance.³¹ The modifications referred to proceed on the principle that before the tenant gives up his right, he is entitled to see that the party requiring him to cede possession has a good title. Consequently, if infestment takes place before decree, the defect is timeously cured.³² It may be a question whether the Court would now demand the production of an infestment before granting decree, if the tenant did not seriously impugn the pursuer's title as heir but took the objection for the purpose of delay. The ratio on which it is settled that a defective instance is sufficiently cured by infestment before decree applies equally to infestments proceeding on precepts or writs of *clare constat*, and to infestments proceeding on ser-

Heirs of lessor.

²⁴ *Tennant v. M'Donald*, 1836, 14 S. 976.

²⁵ *Campbell v. M'Kellar*, *supra*, ²³; *Stewart v. Spalding*, *supra*, ²³.

²⁶ See *Milne v. Young*, and *Brown v. Lang*, reported, M. Appx. Removing, p. 11, Hume 565; and obs. in *Scott v. Fisher*, ²²; but see the older rule in *Tennant v. M'Donald*, *supra*, ²⁴, per L.O. Moncreiff.

²⁷ *Ferguson v. Morison*, 1802, M. 13806.

²⁸ Cr. 2.9.28; St. 2.9.41, 4.26.8; Bankt. 2.9.54; Ersk. 2.6.51, 3.8.58.

²⁹ *Calderwood v. Smith*, 1626, M. 13272; *Paton v. M'Intosh*, 1757, M.

5273, 13806; *Sutherland v. Grahame*, 1759, M. 5276; cf. *Morgan v. V. Arbuthnot*, 1791, M. 5295.

³⁰ *M'Math v. Hewit*, 1606, M. 13265; *Davidson v. Gordon*, 1626, 1 B.S. 31; *Tennant v. Auchinleck*, 1626, M. 13272; *Scott v. Fisher*, ²²; *Mackintosh v. Munro*, 1854, 17 D. 99; and see *Mackenzie v. Gillanders*, 1853, 16 D. 158.

³¹ 37 & 38 Vict. c. 94, sect. 9.

³² *Mackintosh v. Munro*, *supra*, ³⁰; *Brown v. Lang*, *supra*, ²⁶; *Johnston v. Martin*, 3rd March 1810, F.C. 611; *Campbell v. M'Kellar*, *supra*, ²⁵; *Scott v. Fisher*, *supra*, ²².

vices.³³ In other respects the ordinary rules relating to the transfer of right of action *pendente processu* apply in these cases.³⁴

2. *Title of a Limited Owner.*

(a) *Joint and pro indiviso Owners.*

All concur.

Where there are two or more joint or common owners all of them must concur in removing the common tenant,³⁵ however small the interest of any of them may be.³⁶ Thus, where of four co-owners *pro indiviso*, who had let a subject through one of them who took the management, this one was dead at the date of an action of removing brought by two of the others, and neither his heirs nor the fourth co-owner who was resident abroad joined in the action, it was held that the pursuers had no title to sue.³⁷ Exceptions to this rule occur, first, where either at common law or by statute joint-owners—such as trustees—may proceed by a majority or a quorum;³⁸ secondly, where it can be shown that the mandate of a managing co-owner who has acted as lessor extends or must be held to extend to the removing of tenants thus in right, the rule against repudiating the lessor's title having no application in this case;³⁹ and, thirdly, in the case of coadjudgers, any one of whom may sue for a removing, if he is ready with a more solvent tenant, or a greater rent,⁴⁰ or with caution for the rent.⁴¹

(b) *Liferenter and Fiar.*

Concur where lease granted by both.

Where a lease has been granted by liferenter and fiar acting together, or by their common author, the concurrence of both is, on similar principles, required in a removing.⁴² The fiar is after the liferenter's death entitled to carry on alone proceedings begun by both, to the effect of obtaining a removing, but not of

³³ Cf. *Hamilton v. Boswell*, 1715, M. 13803; *L. Drumquhassill v. Cleland*, 1628, M. 13274 (reports inconsistent); with *Stevenson v. Stevenson*, 1623, M. 10430, 13268; *Elphinstone v. Guthrie*, 1625, M. 13270; *Wallace v. Tenants*, 1626, M. 13788; *Jack v. Muirhead*, 1679, 3 B.S. 151, 403. For authorities on titles of donatars, see 2 Hunter 10.

³⁴ See *L. Drumlanrig v. Scott*, 1625, 1 B.S. 24; *L. Crosbie v. Hume*, 1637, M. 16153; *Mackenzie v. Gillanders*, 1853, 16 D. 158; *Hay v. Bandone*, 1613, M. 10365; *Ker v. Nisbet Tenants*, 1623, M. 10367; 1 *Mackay's Practice*, 492, 497. In *Barbour v. Bell*, 1831, 9 S. 334, the action was by assignee's assignee against the cedent of a lease.

³⁵ Cr. 2.9.45; St. 2.9.43, 4.26.10; Bankt. 2.9.47; Ersk. 2.6.53; More's Notes, 258; *Stewart v. Wand*, 1842, 4 D. 622.

³⁶ *Bruce v. Hunter*, 16th Nov. 1808, F.C. 5 (1-71th part).

³⁷ *Grozier v. Downie*, 1871, 9 M. 826.

³⁸ 24 & 25 Vict. c. 84, sect. 1; *M'Laren, Wills*, ii. 185.

³⁹ *Murdoch v. Inglis*, 1679, 3 B.S. 297. *Grozier v. Downie*, *supra*, ³⁷.

⁴⁰ A v. B, 1680, M. 2448.

⁴¹ *Halliday v. Bruce*, 1681, M. 2449.

⁴² *Buchanan v. Yuille*, 1831, 9 S. 843, sequel in 11 S. 682; see *M'Christie v. Fisher*, 1825, 4 S. 11; *Collart v. Ly. Avandale*, 1610, M. 13266.

recovering violent profits, these being due to the liferenter.⁴³ It would probably now be held that an action of removing brought by a fiar without the liferenter's consent would be cured of informality by the death of the latter *pendente processu*.⁴⁴ Kenning to her terce seems to be requisite to enable a tercer to Terce. remove or concur in removing tenants not entered by herself;⁴⁵ but it is not necessary to produce an infetment or the service on which the kenning proceeded.⁴⁶ Courtesy gives a title to sue Courtesy. or concur in suing a removing without sasine or other solemnity.⁴⁷ A parish minister, on his induction but not till then, may remove Parish minister. from the manse, the glebe, or the minister's grass, the tenant or tenants of his predecessor, without formal warning, provided he gives reasonable notice;⁴⁸ but they are entitled to reap crop sown by them prior to the notice, on the principle *messis sementem sequitur*.⁴⁹

(c) *Administrators.*

Power to remove is not co-extensive with power to grant Tutors. leases.⁵⁰ Tutors may sue removings, since these are or may be part of the ordinary administration of the pupil's estate.⁵¹ So Judicial factors. may judicial factors; and special powers are unnecessary and therefore inadmissible.⁵² But the Court will restrain them from proceeding *in malá fide*.⁵³ Power to remove tenants is one of Trustees. the ordinary powers of gratuitous trustees.⁵⁴ A minor may Curators. remove tenants with the consent of his curators.⁵⁵ It has even been held that he can do so without their consent.⁵⁶ But the curators cannot proceed without obtaining and retaining the consent of their minor ward.⁵⁷ A private factor or commissioner Private factors. requires express power, contained in his commission or in some other writing, in order to have a valid title to sue in a removing;⁵⁸ and proceedings will be reduced which have been taken

⁴³ Ramsay v. Homes, 1629, M. 3173, 13792; St. 2.9.41; Bankt. 2.9.41.

⁴⁴ But see Ardwell v. M'Culloch, 1632, M. 13798.

⁴⁵ Balf. 457; Cr. 2.9.21; St. 2.9.41, 4.26.8; Bankt. 3.9.54; More's Notes, 258; Fraser, H. and W. 1108; B. Pr. 1602 seq.

⁴⁶ Maxwell v. Tenants, 1630, M. 2229, 12014, 15842.

⁴⁷ St., Bankt., Ersk., *supra*, ⁴⁵; Fraser, H. and W. 1124.

⁴⁸ M'Callum v. Grant, 1826, 4 S. 527; (N.E. 535), *supra*, p. 30.

⁴⁹ Carnbee Ca., 1807, *n.r.*, but noticed in Duncan, Paroch. Eccl. Law, 520; and

see *ibid.* p. 399.

⁵⁰ York Buildings Co. v. Carnegie, *infra*, ⁵⁸.

⁵¹ Fraser, P. and Ch. 258.

⁵² Thomson v. Elderson, 1757, M. 4070; Carlyle v. Lowther, 1766, M. 8380, 5 B.S. 571.

⁵³ Edgar v. Whiteheads, 1714, M. 4053.

⁵⁴ 30 & 31 Vict. c. 97, sect. 2.

⁵⁵ Ersk. 1.7.16.

⁵⁶ Ardross Heirs v. Dishington, 1566, M. 8938, questioned in Fraser, P. and Ch. 378, justly.

⁵⁷ Allan v. Walker, 1812, Hume 586.

⁵⁸ York Buildings Co. v. Carnegie, 1764, M. 4054.

and carried through without such authorisation.⁵⁹ It would appear, however, that a written authority granted *post*, will cure the informality of a verbal authority granted *ante, litem motam*; and that power to grant leases involves, in the absence of the constituent abroad, power to remove tenants.⁶⁰

(d) *Adjudgers.*

An adjudger who has charged the superior of the lands to enter him has not a title to pursue a removing of the tenants, infetment being necessary in conformity with the general rule, which is not affected by the *pari passu* ranking of adjudgers within year and day.⁶¹

(e) *Lessee.*

In accordance with the rule stated in the outset, a principal lessee may remove his subtenant without the concurrence of his landlord, though the consent of the latter was originally required to render the sublease effectual.⁶² On the other hand, in order to entitle a lessee to remove tenants or possessors not holding of him as lessor there must be authority to remove either express or implied. The usual form of express grant is a power 'to 'output and input tenants.'⁶³ A title to sue is implied if the lease is for life or for more than nineteen years;⁶⁴ or if the lessor or lessee have been in possession.⁶⁵ In other cases the lessee must proceed by declarator and removing, decree in the declarator being necessary to success in the ancillary conclusion.⁶⁶ The Court will look into the lessee's title for the purpose of ascertaining, for instance, whether he is really a lessee or only the factor of a landlord who does not insist in the removing,⁶⁷ or whether the defender's subjects are or are not excepted from the lease.⁶⁸

⁵⁹ Johnston v. Dickson, 1831, 9 S. 452; Slowey v. Robertson, 1865, 4 M. 1.

⁶⁰ Shinas v. Fordyce, 1777, 5 B.S. 572; Thomson v. Handyside, 1833, 12 S. 557.

⁶¹ Chalmers v. Dalrymple, 1701, 4 B.S. 589; 1661, c. 62; St. 2.9.41, 3.11.24, 4.26.8; Bankt. 2.9.54. As to right of heritable creditors, see p. 45.

⁶² M'Treavie v. Smith, 1810, Hume 851.

⁶³ Balf. 417; Cr. 2.9.24; St. 2.9.41; 4.26.8; Bankt. 2.9.54; Ersk. 2.6.51; Logie v. Corsie, 1847, 9 D. 1161 (cottars).

⁶⁴ Last note and More's Notes, 258; Gentle v. Henry, 1747, M. 13804; and this must have been the state of the facts in Galashiels v. Mackerston, 1629, M.

1525, since there was no possession.

⁶⁵ Gentle v. Henry, *supra*, ⁶⁴; Sandilands v. Carmichael, 1542, M. 13781.

⁶⁶ 2 Bell, Leases, 61. In a very special case, which was brought by a lessee against the lessor only, to obtain removal of cottars, the question as to the nature of the tenure of these persons was not reached, the case being dismissed mainly on account of their not being called—Winans v. Mackenzie, 1883, 10 R. 941.

⁶⁷ Johnston v. Dickson, 1831, 9 S. 452.

⁶⁸ Ritchie v. Dickson, 1857, 19 D. 949—as to which proof allowed. Subtenancy was alleged, so that there could be no doubt of the pursuer's title if this question were decided in his favour.

The right of a lessee to sue a removing is only lost when a decree of removing has been obtained against him by his landlord—a decree of reduction of his lease not being enough to alter the state of possession.⁶⁹ An action of removing by a tenant against a subtenant is not a convenient process in which a third party may raise questions of heritable right; and the removing will be allowed to proceed in spite of his intervention.⁷⁰ Crofters who employed a herd had a right to dismiss him from their employment, but had no right to remove him from the herd's croft, of which they were neither proprietors nor tenants; and it was questioned whether in any circumstances tenants under verbal leases could pursue a summary removing.⁷¹

III. DEFENDERS.

The persons who are to be called as defenders are described in Possessors. the Act of 1555⁷² as 'the parties warned and possessours of ' the ground.' The persons who had to be warned under the obsolete procedure set out in that Act were all who had or alleged a right to possession.⁷³ Where the defence set up for a tenant is that he holds under a third party claiming a heritable right, the more convenient, probably the alone competent, course in modern times is to raise a declarator and removing.⁷⁴ Where the lease is held jointly or *pro indiviso* by two or more tenants all must be called,⁷⁵ if it is intended that all should be removed; but it is quite competent to oust certain *pro indiviso* lessees, while allowing the others to sit on.⁷⁶

With regard to the calling of assignees and subtenants, the Assignees and subtenants. rule is partly ascertained by a provision (sect. 3) of the Act of Sederunt of 14th December 1756, which is in substance declaratory of the common law:—

Where a tack is assigned and the assignation not intimated by an instrument, or where the lands are subset in whole or in part to subtenants, such horning execute as aforesaid,⁷⁷ or where process of remov-

⁶⁹ *Semle*—*Innes v. Allardice*, 1822, 2 S. 93 (N.E. 85)—interdict against poachers.

⁷⁰ *Shirlaw v. Wilson*, 1823, 2 S. 561 (N.E. 485).

⁷¹ *Cameron v. Robertson*, 1867, 39 Sc. Jur. 256 (Lochiel); and see *Sinclair v. Leslie*, 1887, Sc. W.N. 27.

⁷² *Infra*, chap. xxi.

⁷³ Cr. 2.9.36; Mack. Obs. 155; Ross, Remov. 65.

⁷⁴ See the older authorities in M.

2226.9; Balf. 457; Cr. 2.9.36; St. 2.9.43, 4.26.5; and for a very special case, *Campbell v. D. Argyll*, 1836, 14 S. 798.

⁷⁵ *McDonald v. McDonald*, 1807, Hume 580 (only on passing the note, but the doctrine seems sound). As to the mode of citing a plurality, see *Macdonald v. Sinclair*, 1843, 5 D. 1253.

⁷⁶ St. 2.9.43, 4.26.10; Bankt. 2.9.67.

⁷⁷ Under sect. 1 of the A.S., *infra*, p. 477.

ing and decreet is obtained,⁷⁸ or where warning in terms of the Act 1555 is used against the principal or original tacksman, the same shall be effectual against the assignees or subtenants, one or more, and the action of removing against the principal or original tacksman and decreet of removing following thereon shall be effectual against such assignees and subtenants as aforesaid, and shall be sufficient ground of ejecting them, anything in the former practice to the contrary notwithstanding.⁷⁹

Therefore where the tenant of a farm, who had no express power to sublet, was removed by decree, his subtenant of a mill on the farm was held to be properly ejected by summary process, the landlord's private knowledge of the subtack being an irrelevant circumstance.⁸⁰ But, if the assignee's right has been intimated to the landlord,⁸¹ or the sublessee has been acknowledged, through receipt of rent direct by the landlord or otherwise, they are the proper contradictors.⁸² If not thus put in place of the principal tenant, an action of removing brought against a subtenant alone will not avail to oust his author.⁸³ It is, however, a safe precaution to call all possessors on whatever title as defenders in a removing, and there is no advantage in separating the instance.⁸⁴ But, if possession is held by an assignee or subtenant in defiance of an exclusion arising *ex lege* or by agreement, the intruder may be removed summarily without calling his author.⁸⁵ Care should be taken to select the real tenant for attack.⁸⁶

⁷⁸ Ibid. sect. 2, *infra*, p. 484.

⁷⁹ Following *E. Marchmont v. Fleeming*, 1743, M. 13839—the lease had run out and the subtenant had not been warned.

⁸⁰ *Wilson v. Campbell*, 1839, 2 D. 232; *D. Queensberry v. Barker*, 7th July 1810, F.C. 743 (substantially an assignment).

⁸¹ The A.S. demands (too scrupulously it is thought) a notarial instrument; see *supra*, p. 166.

⁸² *Ross, Remov.* 98; *Ly. Lawriston v. Tenants*, 1632, M. 13810.

⁸³ *Laing v. N.* 1565, M. 13807 (though possessing only on tacit relocation); *Whiteford v. Johnston*, 1628, M. 13809 (*do.*); *Richard v. Kirkland*, 1663, M. 13812; *Thomson v. Harvie*, 1823, 2 S. 581 (N.E. 498).

⁸⁴ *Davidson v. Girvan*, 1838, 16 S. 1125.

⁸⁵ *Infra*, p. 498.

⁸⁶ *Grant v. Grant*, 1753, M. 13841 (stepfather of pupil tenant); *Dunbar*, 1582, M. 13819.

CHAPTER XX.

TERMINATION DURING CURRENCY.

LEASES come to an end sooner than at the most remote ish contemplated, in three ways—by renunciation; in pursuance of a break; and by virtue of an irritancy.

I. RENUNCIATION OF LEASES.

The circumstances in which a tenant is entitled to renounce or throw up his lease on account of a breach of the mutual contract by his landlord must be sought in other parts of the work. The renunciations which are to be noticed here are such as are consented to by the landlord, expressly or by necessary implication.¹ The present subject is further narrowed by reserving to next chapter the law of obligations or agreements to remove at the natural ish, the aim of such obligations being merely to facilitate ordinary removings.

Where the renunciation is express, the act is so simple that little difficulty can arise in construing the writ. It is granted by the tenant or by a third party entitled to act for him in the premises.² The usual form with pedantic pleonasm renounces, discharges, and *simpliciter* upgives all right, title, interest, and possession which the tenant had by virtue of his lease, and contains an obligation to remove.³ Or it simply renounces in favour of the landlord, and his heirs and successors, the lease, and all right therein and to the lands, and all claims under the lease as at a stated term, and obliges the tenant to remove.⁴ The notarial instrument which formerly solemnised the delivery of this writ,⁵

Renunciation following on breach.

Renunciation by consent.

Express renunciation.

¹ See also the rules as to abandonment by the tenant's heir, *supra*, p. 153.

² *Williamson v. Johnstone*, 1848, 11 D. 332 (trustees for creditors).

³ 1 Jur. Styles (4th ed.), 674; Ross on Removings, Appx. 163. See a very special case containing allegations, which,

though probably relevant in a reduction of the renunciation were out of place in a suspension of a charge under it to remove—*Munro v. Baillie*, 1856, 19 D. 127.

⁴ 1 Jur. Styles (5th ed.), 712.

⁵ Bankt. 2.9.47; Office of a Notary, 190; 1 Jur. Styles (4th ed.), 657.

Effect of discharge of claims.

was never necessary, and is now obsolete.⁶ The landlord, or his factor duly authorised, accepts in writing, which usually contains, *per expressum* or by reference to the renunciation, a discharge of bygone rents and other prestations; ⁷ or his acceptance may be proved by conduct inconsistent with the maintenance of the lease, such as taking possession.⁸ Where a tenant had delivered up his missive of lease and with it an improbative renunciation, the landlord was not barred from demanding a removing by the facts that the tenant had possessed during the few months he survived the renunciation, and that thereafter his widow and youngest son had possessed for some years. These facts did not weaken the *rei interventus* which consisted in the eldest son's refraining from demanding possession.⁹ Where there was a question as to whether a renunciation had been accepted, and the tenants who were bound to keep the premises in repair removed, the landlord was held entitled to a judicial inspection of the premises at once and long before the natural ish, since, if the tenants were right in their view that an agreement had been arrived at, he might have lost his claim for repairs by delay.¹⁰ An express acceptance implies a discharge of all claims otherwise competent *hinc inde*; ¹¹ and very precise words will be required to instruct an exception to this rule, especially if the claim be for damages through breach of the tenant's contract to possess down to the termination of the lease.¹²

Incoming tenant a party.

In one case a renunciation was complicated with arrangements made with incoming tenants. Coal tenants, with their landlord's consent, renounced their lease. The mineral was in the same deed let to third parties on the terms of an existing lease they had of an adjoining field from the same landlord, subject to an alteration which had been made in its provisions. That lease provided only for regular systematic and proper working, contained no obligation to exhaust the field and (as altered) allowed the tenants an option to break at any Martinmas on certain notice. There was a separate agreement made substantially *unico contextu* between the outgoing and the incoming tenants binding the latter to pay to the former a certain lordship at the terms on which the landlord's lordships fell to be paid. The in-

⁶ B. Pr. 1271.

⁷ 1 Jur. Styles (5th ed.), 712.

⁸ Bankt. 2.9.47.

⁹ Milne v. Forbes, 1830, 8 S. 990.

¹⁰ Lees v. Marr Typefoundry Co., 1877, 4 R. 1088,

¹¹ Lyons v. Anderson, 1886, 13 R. 1020, *per* L.J.-C. Moncreiff and L. M'Laren.

¹² Walker's Trs. v. Manson, 1886, 13 R. 1198.

coming tenants ceased to work the coal let to them in their new lease. It was held that, in the absence of any indication of collusive arrangement between them and the landlord for their getting rid of this obligation and then being reinstated in possession, they were under no obligation to the outgoing tenants either to exhaust or to continue working the mineral.¹³ If the renunciation is stipulated to take effect at a future date on condition of payment by the landlord of a fixed sum, his intervening bankruptcy puts the tenant to his election either to hold to the lease or to claim in the sequestration.¹⁴

Effect of landlord's bankruptcy.

Renunciation may be implied from facts and circumstances inconsistent with the existence of the lease in question. The ordinary case is the acceptance of a new lease differing in some material respect from the old;¹⁵ and the main difficulty is to determine whether there is any real inconsistency, or whether there is on the contrary a mere suspension of the earlier contract, subject to revival in certain events. The presumption is in favour of the latter view of the facts;¹⁶ but everything turns on the intention of the parties as set out in the new lease. The cases are all of ancient date;¹⁷ in modern times care is taken to leave no doubt on the matter. These cases are collected below; it would serve no useful purpose to enter into detail.¹⁸ Another and kindred mode of extinguishing a lease is *confusio*, by merger in the ownership through succession or singular title. Where the confusion takes place through a purchase of the lease by the landlord (or in other words by accepting a renunciation) or by his succession to the tenant there can be little if any doubt that the lease is extinguished. There is greater difficulty where a tenant purchases or succeeds to the land in such a way as to be

Implied renunciation.

Taking new lease.

Confusio.

¹³ *Convery v. Summerlee Iron Co.*, 1884, 12 R. 191—distinguished from case of sale of a medical practice, &c., where maintenance is an implied condition. See also case of arrangements between outgoing and incoming tenants on a renunciation—*Nivison v. Howat*, 1883, 11 R. 182.

¹⁴ *Ferrier v. Hector*, 1822, 1 Sh. Ap. 159. Cf. *Harvie v. Haldane*, 1833, 11 S. 872; *Harkness v. Rattray*, 1878, 16 Sc.L.R. 117. As to the rights of parties where only one of two leases has been renounced. See *Stevenson's Trs. v. Ms. Tweeddale*, 1823, 2 S. 191 (N.E. 169).

¹⁵ Cr. 2.9.3; St. 2.9.36; Bankt. 2.9.48; Ersk. 2.6.44,

¹⁶ *L. Symington v. Weir*, 1566, M. 342, 5037.

¹⁷ The more recent cases are of no general value—*Hopkirk v. Kelly*, 1834, 13 S. 223 (special); *Kennedy v. Carlyle*, 1836, 15 S. 102 (unimportant excambion); *Summers v. Fairservice*, 1841, 4 D. 347 (fraud).

¹⁸ *Sinclair v. Manderson*, 1565, M. 6424 (liferent and short tacks); *Min. of Kirknewton v. Balmerino*, 1630, M. 6426 (higher rent); *Kennedy v. Jaffray*, 1669, M. 6427 (from third party), and cases in St. 2.9.36. Looking to the parties and the date, *D. Lauderdale v. E. Tweeddale*, 1678, M. 6427, seems no authority, and to be unsound.

entitled to immediate possession on that title;¹⁹ but in principle it would seem that the same rule must prevail and that the merger takes place for all intents and purposes. It is settled that where a tenant obtains a feu-charter of his premises, the conditions of his lease are obliterated, and the charter alone can be looked to as embodying his right and obligations;²⁰ and that the real value of the land and not the former rent is to be adopted as the rule in estimating the amount of composition due to the superior.²¹ It is submitted that the lease cannot revive by the act of the purchaser or his successors in the land; and that if they again let the lands on similar terms or send the fee and the lease along different lines of destination, the result is effected by means of a new, not a restored contract. In regard to the effect of a reduction of the heritable title—if the action be brought by one who does not represent the original lessor, feu and lease are extinguished together. So that the only question remaining is as to the effect of a reduction of the heritable right by the lessor or some one in his right. It is settled (probably on the ground of personal bar in the one case and representation in the other) that the lease revives.²² The acquisition of a redeemable heritable security over the subjects by the tenant does not of course give rise to *confusio*.²³

Personal
incapacity.

Special powers.

In addition to what has been said in the First Part of this Book regarding the incapacity of certain persons to enter into or to innovate on leases, the disabilities of these persons in respect to renouncing or accepting renunciations of leases must here be noticed. The Court has been in the habit, after inquiry by remit or otherwise, of granting special powers to accept renunciations to and in favour of tutors,²⁴ factors *loco tutoris*, curators *bonis*, and judicial factors on trust estates,²⁵ when it is satisfied that the interests of the landlord demand the acceptance. Similarly, power to renounce leases is granted to tutors,²⁶ judicial factors,

¹⁹ A third party's liferent in the lands delays the merger—*L. Cauder v. Hamilton*, 1610, M. 3082.

²⁰ *Campbell v. M'Kinnon*, 1867, 5 M. 636, not appealed on this point, 8 M. (H.L.) 40.

²¹ *L. Blantyre v. Dunn*, 1858, 20 D. 1188; see *Ms. Douglas v. Somervels*, 1674, M. 11502; *Rigg*, 1777, M. Teinds, Appx. 3.

²² *M'Dougal v. Campbell*, 1566, M. 3082; *E. v. Cs. Dunfermline*, 1628, M. 3084; *Lesmore v. Hutcheson*, 1634, M. 3084; *Balf. 207*; *Cr., St., Bankt., Ersk.*, *supra*,¹³. See the authorities on *confusio* in the law of servitudes in *Rankine*,

Landownership, p. 369.

²³ *Erskine's words* in 2.6.44 are therefore too wide.

²⁴ *Brown*, 1846, 9 D. 250.

²⁵ *Wink*, 1851, 13 D. 952 (inadequately stocked farm; tenant unable to go on); *Milne*, 1834, 13 S. 222, 14 S. 561, 681; see *M'Gregor*, 1837, 15 S. 1092; *Russell* 1840, 2 D. 721 (to relet after a renunciation).

²⁶ *Cockburn's Tutors v. Cockburn*, 1825, 3 S. 642 (N.E. 449); *Turner's Trs.*, 1862, 24 D. 694; *Blyth v. Craig*, 1808, *Hume* 889; but see *Forman's Tutors*, 1805, *Hume* 888.

and curators,²⁷ on whom has devolved the management of estates including the tenant's right to a lease, where on account of insufficiency of capital or any other cause the lease cannot be carried on with a fair prospect of profit; or even, it would appear, where the circumstances are such as to make it more for the tenant's interest to accept a sum down for a renunciation than to carry on a doubtful enterprise.²⁸ In renouncing and accepting renunciations these officers should not proceed without the sanction of the Court. On the other hand, a minor acting Minors. alone, when he has no curators, or with their concurrence, if he any have, is entitled to proceed without judicial authority, and the Court declines to interfere except by way of reduction within the *quadriennium utile*.²⁹ And trustees are equally denied whatever protection special powers may afford, the power of granting or accepting renunciations of leases, being left to the common law by the Trusts Acts of recent years.³⁰

II. BREAKS.

A break³¹ in the option of the tenant alone is a power to renounce,³² the landlord's acceptance being predetermined. Powers to re-nounce and resume. A break in favour of the landlord is a power to resume. It differs from the partial or piecemeal faculty to resume,³³ which is frequently reserved by a landlord for the express purpose of planting, feuing out, mining, quarrying, or the like, in being applicable to the whole subject let. A break in favour of each party involves both powers. Breaks are mainly of use in leases of subjects which are in the main of unascertained and at the outset unascertainable value, such as mines and quarries; but they are not uncommon in leases of houses and farms for reasons more personal to the lessor or lessee. They differ from irritancies³⁴ and from those clauses in mineral leases which provide for the termination of the contract on the unworkableness of the mine to a profit being ascertained by a submission to men of skill, in depending wholly on the lapse of a stipulated space of time (or the arrival of certain terms) and

²⁷ *Meikle v. Meikle*, 1823, 2 S. 274 (N.E. 242); *Carrick v. Warden*, 1829, 3 S. 208; *Robertson*, 1841, 3 D. 345; *Grahame*, 1851, 14 D. 312; *McEwan v. Crearer*, 1852, 2 Stu. 137. The case of *Ms. Douglas v. Somervels*, 1674, M. 11502, is special.

²⁸ Cf. *Blyth*, *supra*, ²⁶, and *Slade*, 1831, 10 S. 167 (substantially or formally subsets) with *Forman's Tutors*, *supra*, ²⁶.

²⁹ See *supra*, p. 19; and *Farquhar v.*

Campbell, 1628, M. 9022.

³⁰ 24 & 25 Vict. c. 84; 26 & 27 Vict. c. 115; 30 & 31 Vict. c. 97; 47 & 48 Vict. c. 63; and see *Robertson v. Scott*, 1834, 12 S. 875 (bankruptcy trustee).

³¹ The term 'breach' is misleading, and obsolete in this connection.

³² *Supra*, p. 449.

³³ *Supra*, p. 194.

³⁴ *Infra*, p. 458.

a timeous intimation that the option is to be exercised. The clause sets out this period (or these terms), provides for intimation being made at or before a certain time prior to the date of the break, and sometimes specially stipulates for a settlement *hinc inde* of the rights and obligations of the parties.³⁵ And as alternative to a break there may be provision made for readjustment of rents.³⁶

In whose option?

Care is usually taken to make it clear which of the parties has the option to break; but in two cases it fell to the Court to determine the meaning of an ambiguous or defective clause. In the earlier of the two, the minute of lease let the land 'for the 'space of seven or thirteen years.' The landlord brought a removing as at the end of the shorter period. But the option was held to vest in the tenant alone, on the rule of construing *contra proferentem*,—in this case against the party who prepared the minute.³⁷ In the other case, according to the landlord's copy of missives executed in duplicate by and between the tenants and the factor of the landlord the break clause ran thus: 'with a break, 'however, at the expiry of the first seven years of the lease,' and ended there. The tenants' copy added 'optional to the tenants.' A proof showed that other additions in the tenants' copy had been sanctioned by the landlord. It was held that, in the absence of fraud, the facts favoured the view that the addition was part of the contract; that both of the duplicates had to be looked at; and that the factor, having power to grant a lease, had also power to modify and had modified its original terms.³⁸

In landlord's option.

Though breaks are found in practice to run more frequently in favour of tenants than of their landlords, all the other cases which can be cited in illustration of the law have arisen in settling disputes regarding the exercise of the option by landlords. The questions, which have arisen, relate—(1) to the parties who may give intimation of the exercise of the option; (2) the nature of the intimation: and (3) the mode in which the option is made effectual.

Party in right.

1. There seems to be no doubt that unless there be something in the wording of the clause to confine its scope, the option to break being a faculty 'bearing reference to the general relation 'of landlord and tenant,'³⁹ is transmissible in favour of singular

³⁵ 1 Bell, Leases, 214; 1 Jur. Styles (5th ed.), 607, 619, 623, 639, 653, 661, 678, 699 (sporting lease).

³⁶ But in *Wallace v. Tacksman*, 1715, 5 B.S. 7, the clause seems to have been

misconstrued, there being no real alternative in the tenant's favour.

³⁷ *Johnston v. Gordon*, 1805, Hume, 822.

³⁸ *Grants v. Sinclair*, 1861, 23 D. 796.

³⁹ *Supra*, p. 408.

successors of the lessor. This presumption that the option runs with the lands (or rather with the reversion) is so strong that it was given effect to in two cases, in which the terms of the clause might fairly have been read as restricting the right to a personal faculty. In the one, the clause provided that 'in case the said E.A. [the lessor] inclines to resume and take possession of the subjects hereby let at any time during the currency of this tack *personally and by herself only*, on her paying up a debt to the lessee and giving a certain premonition, 'this tack in that event is declared to cease.' The debt was paid; the lands were sold; and notice was given by the purchaser. It was held that in spite of arguments drawn from the use of the words here italicised the purchaser was entitled to take advantage of the break; but a good deal turned on the obvious aim of the lease as security for payment of debt.⁴⁰ In the other case, land was let for eleven years 'with a break at the end of five years in favour of R [the landlord], in case he chooses to take the whole or a part for himself or his brother.' In a removing brought by a vendor, in order to clear his purchaser's title to possess, the judgment was that the option was transmissible to a purchaser of the lands. It was remarked that 'the texture of a clause of resumption might be such as to make it otherwise; but there would be need of a precise limitation for that purpose; and where such was truly the intention of parties mention was ordinarily made of residence or plantation or other the like peculiar destination of the land, for the convenience of the individual heritor.'⁴¹

In determining questions as to capacity to exercise the option, the clause must be fairly construed, and any valid condition it contains must be given effect to. Therefore a lease by a trustee for creditors stipulating for a break 'optional to the proprietor, to be exercised in the event only, however, of his wishing to take up his residence there and to resume possession thereof,' bestowed an option not on the trustee but on the bankrupt, who held the radical right of ownership.⁴² And where the option was taken in favour of the landlord's eldest son on a certain premonition, under condition that 'unless such premonition was duly made and he entered into and possessed the premises at' the specified date, he should not thereafter be entitled to resume,

Trustee for
creditors.

Heir.

⁴⁰ Murray v. Brodie, 1806, Hume 825.

⁴¹ Ross v. M'Finlay, 1807, Hume 832. Mr. Hunter doubts the soundness of these two decisions (ii. 113); but they do not

seem to be inconsistent with sound principle.

⁴² Davidson v. Girvan, 1638, 16 S. 1125.

and at the said date the son was in active service, it was held that possession by means of servants and managers was not enough to comply with the condition, and that the lease must run on to its natural ish.⁴³

Intimation.

Without
reasons given.

2. The party who seeks to exercise his option cannot be called on to condescend on his reasons for so doing. This was first decided in a case where there was a power of resumption of part of a house and its adjuncts 'in case the Earl [the landlord] shall 'incline.'⁴⁴ In the next case the irresponsibility of the landlord was explicitly set out. The clause ran that 'in case of . . . 'personal misconduct on the part of the tenant of which the said' lessor 'shall be the sole judge,' the lease after certain notice given should be cancelled. The notice alleged personal misconduct 'of which you [the tenant] are well aware I have had ample 'ground of complaint.' The notice was left unanswered. It was held sufficient in the absence of any allegation of fraud; but the question was not decided whether, if the tenant had denied misconduct and demanded particulars, he could have forced on a proof.⁴⁵ The law was advanced a step in the latest case, where a minute of agreement modifying a mineral lease provided that in the event of the tenant's death the landlord might resume at a valuation, 'if he should at any time be dissatisfied with the 'working' [of the colliery, &c.] by the tenant's representatives. Intimation of dissatisfaction was made, without any statement of the grounds for it. There were vague averments of *mala fides*. It was held that the *onus* lay on the representatives of instructing that, the landlord not being at the date of the intimation truly dissatisfied, it was not made *in bona fide*; that the averments were insufficient to let in proof; and that the landlord must prevail. The tendency of the Court was to regard proof as out of place, whatever averments might be made, the matter being left to the landlord's conscience. At any rate a better offer behind was not sufficient to redargue *bona fides*.⁴⁶

Remedies.

Warning.

3. In the ordinary case the landlord's option is given effect to by an action of removing, though if there be a known dispute as to the meaning or effect of the clause declaratory conclusions may be prefixed with advantage.⁴⁷ Where, as is usual, a period of premonition is agreed on, a notice conform thereto will be

⁴³ *Whitson v. Duncan*, 1795, Bell's Fol. Ca. 161.

⁴⁴ *E. Rosebery v. Brown*, 7th March 1811, F.C. 231.

⁴⁵ *Stewart v. Rutherford*, 1863, 35 Sc.

Jur. 307.

⁴⁶ *Houldsworth v. Brand's Trs.*, 1875, 2 R. 683; sequel in 3 R. 304, 4 R. 369, see next page.

⁴⁷ *Ibid.*

regarded as sufficient warning and the rules applicable to solemn removings⁴⁸ will not be insisted on, though, if the break is stipulated to take place at one of the legal terms, it will be judicious to bring the action of removing in accordance with the Act of Sederunt of 14th December 1756 and the Sheriff Court Act of 1853.⁴⁹ Even where there is no stipulation as to the date of removing, it would probably be held in the case of a farm that the tenant could not be called on to quit possession between terms, and that the intimation should demand a removing at the term or terms in use in the district.⁵⁰ If there be no covenant regarding notice, a reasonable length of time must be allowed to the tenant to make arrangements. Thus a period of three months or thereby was held to be sufficient premonition of intention to resume part of a farm;⁵¹ but there the tenant continued in possession of the rest, and did not require to negotiate for another holding. A subtenant was held to have received ample notice of the lapse of the principal tenant's right and of his own removing, where the intimation to him was made seven months before a petition for summary ejection was raised.⁵² In a case of the lease of a colliery, where intimation of an intention to resume was made on 3rd February 1874, and the tenants pending litigation retained possession till Martinmas 1875, it was held that the period between the former date and Whitsunday 1874 was a reasonable time for making the necessary arrangements for ceding possession, including the closing of the tenant's colliery engagements, disposal of surplus stock, dismissal of employees, and valuation of the plant which the landlord was to take over.⁵³ A process of removing which has broken down for some reason which does not involve abandonment of the option, may be founded on as sufficient notice in a subsequent action which without it would have come too late.⁵⁴ And, where the clause bore that the 'parties reserved to themselves the power of putting 'an end to the lease by either of them giving twelve months' 'notice to the other of such intention,' it was held that the landlord had not lost the power by having given a notice some years before the notice in question, without following it up by a removing.⁵⁵

⁴⁸ *Infra*, p. 481.

⁴⁹ *Ibid.*; 16 & 17 Vict. c. 80, sect. 29; see *Wallace v. Tacksman*, 1715, 5 B.S. 7—under 1555, c. 39, *infra*, p. 481.

⁵⁰ See *Granger v. Geils*, 1857, 19 D. 1010.

⁵¹ *Sharp v. Clark*, 1807, Hume 577.

⁵² *Wilson v. Campbell*, 1839, 2 D. 232 (between terms, the subject being a mill).

⁵³ *Houldsworth v. Brand's Trs.*, 1877, 4 R. 369.

⁵⁴ *Ross v. M'Finlay*, 1807, Hume 832.

⁵⁵ *Granger v. Geils*, *supra*, ⁵⁰.

Violent
profits.

Adjustment of
rights at out-
going.

The rules which regulate the liability for violent profits or damages where the tenant refuses or delays to cede possession will be considered hereafter.⁵⁶ There is little authority in regard to the adjustment of the rights of parties at the date of the removing. In one case, the tenant erected buildings on land let under a lease which (as renewed) was regarded as terminable on six months' notice by the landlord or on three months' notice by the tenant who, on giving the same, was to be entitled to remove the materials. The lease was terminated by notice on the landlord's part. The tenant did not give notice of intention to remove the materials; but it was held that this was unnecessary since the longer superseded the necessity for the shorter premonition.⁵⁷

III. IRRITANCIES.

In the event of breach of contract by a tenant his landlord is entitled to raise an action of damages for the breach,⁵⁸ or, where the breach infers an irritancy either by force of the general law of the land or in virtue of stipulation to bring the lease to an end. He cannot both irritate the lease and claim damages on the ground of premature termination.⁵⁹ Irritancies are either legal or conventional. The legal irritancies are few in number, and are regulated or imposed by the Act of Sederunt of 14th December 1756 as amended by recent legislation—by the Agricultural Holdings Act, and by the Sheriff Court Act of 1853. There is, of course, no limit to the number of conventional irritancies, with which the caprice of a landlord and the necessities of a tenant may encumber a lease; but the obligations which are ordinarily fenced with an irritancy are also few in number.

A. LEGAL IRRITANCIES.

(a) *At Common Law.*

In early times. Prior to 1756, there was at common law a well recognised legal irritancy in case of default of payment of rent for two successive years.⁶⁰ After some fluctuation in the direction of

⁵⁶ *Infra*, p. 487; and obs. in next case.

⁵⁷ *Laing v. Stephenson*, 1848, 11 D. 142.

⁵⁸ See case in which he chose this alternative—*Kinloch v. Mansfield*, 1836, 14 S. 905.

⁵⁹ *Walker's Trs. v. Manson*, 1886, 13 R. 1198.

⁶⁰ Cr. 2.10.7; St. 2.9.32; Mack. 2.6.11, note; Mack. Obs. 297; Bankt. 2.9.23;

Ersk. 2.6.44; 2 Ross' Lect. 497; Ross on Removing, 101; *Alexander v. Jackson*, 1744, M. 15306. The rule was probably founded on the analogy of feu-rights, and that again on the irritancy *ob non solutum canonem* (for three years) in the Roman law of *Emphyteusis*. There is nothing similar in the Roman law of *Locatio*.

greater or less severity,⁶¹ the rule, presently to be stated, requiring caution where a year's rent is unpaid was finally established, with this difference, that the caution applied to all future rent.⁶² There seems to be no trace of a practice to order caution in case of desertion or mislabouring.⁶³ All the cases prior to 1756 seem to relate to agricultural holdings. In regard to urban tenements, it has been already pointed out⁶⁴ that more summary remedies are competent to a landlord in the event of his tenant's deserting possession or displenishing the premises; so that it is probably of no practical consequence to lay down that the common law remedies just mentioned apply to houses as well as to landward tenements.⁶⁵ These rules of the common law would probably be held to strike at leases of minerals, but in practice they are superseded by conventional irritancies of a stricter description in the event of default in payment of rent.⁶⁶ There is in the law of leases of fisheries⁶⁷ and shootings an equal absence of authority and of any principle potent enough to remove them from the purview of the common law rule. In all cases in which that rule has to be applied without the help of the Act of Sederunt, the remedy, being an extraordinary removing, proceeds by action in the Court of Session.⁶⁸

Subjects to which irritancy applies.

(b) *By Act of Sederunt, 1756.*

The Act of Sederunt of 14th December 1756⁶⁹ applies only to leases of agricultural (including pastoral) subjects.⁷⁰ It proceeds on the preamble that the difficulties that had occurred in actions of removing from lands had been found to be highly prejudicial to agriculture, and both to masters and tenants, and that the Court had resolved to remedy this great evil. The sections which follow are, some of them (sects. 6 and 7) purely provisions relating to procedure; others are in part really though not expressly declaratory of the then existing law, and in part novel

Act of Sederunt, 1756.

⁶¹ Traced in Balf. 206; St. 2.9.33; Bankt., Ersk. *supra*,⁶⁰; Lawson v. Scott, 1627, M. 15302; Stevenson v. Job, 1629, M. 15303 (*vergens ad inopiam*, but not due a year's rent); Fisher v. Turnbull, 1632, M. 15303; Waughton v. Aickin, 1633, M. 15304; E. Murray v. Hume, 1662, M. 15304 (*vergens*; counter-claims); Ly. Binning v. Sinclair, 1672, M. 10382, 15034 (two years' arrear required).

⁶² Alexander v. Jackson, *supra*,⁶⁰.

⁶³ See Lawson v. Stevenson, *supra*,⁶¹.

⁶⁴ *Supra*, pp. 212, 351.

⁶⁵ Cunningham v. Halyburton, 1677, M. 13801, 15305 (subtack); 2 Bell,

Leases, 43.

⁶⁶ See 1 Jur. Styles, 619, 634, 659, 675.

⁶⁷ See *ibid.* 697.

⁶⁸ St. 4.18; Mack. 2.6.11; Ersk. 2.6.44, 50; L. Jerviswoode v. Livingston, 1632, M. 7408; Bethune v. Tenants, 1681, M. 7307, 7409 (in spite of alleged prorogation of jurisdiction); Cormack v. Copland, 1754, 5 B.S. 820; Nisbet v. Aikman, 1866, 4 M. 284.

⁶⁹ Printed in Appx. No. viii.

⁷⁰ 2 Bell, Leases, 43; Wright v. Wightman, 1875, 3 R. 68; terms of preamble and sect. 5 of the A.S.

enactments, such as it was *ultra vires* of the Court to make.⁷¹ But the force of practice at first and subsequent recognition of the Act in statutes of the realm⁷² have put the validity of the regulations contained in it beyond the reach of dispute. The sections dealing with the matter in hand are the 4th and 5th.

Rent two years
in arrear.

The 4th section provides that

‘where a tenant has irritated his tack by suffering two years’ rent to be in arrear, it shall be lawful to the setter or heritor, to declare the irritancy before the Judge Ordinary and to insist in a summar removing before him; and it shall be lawful to the sheriff or steward-depute or their substitutes to find the irritancy incurred, and to decern in the removing, any practice to the contrary notwithstanding.’

It is here assumed that irritancy follows at common law on an arrear of two years’ rent; and the novelty introduced was the exclusive⁷³ jurisdiction of first instance conferred on the Sheriff Court.

Caution on
arrear for one
year or deser-
tion.

The 5th section provides that

‘where a tenant shall run in arrear of one full year’s rent or shall desert his possession and leave it unlaboured at the usual time of labouring, in these or either of these cases it shall be lawful to the heritor or other setter of the lands to bring his action against the tenant before the Judge Ordinary, who is hereby empowered and required to decern and ordain the tenant to find caution for the arrears and for payment of the rent for the five crops following, or during the currency of the tack if the tack is of shorter endurance than five years, within a certain time to be limited by the judge,⁷⁴ and, failing thereof, to decern the tenant summarily to remove, and to eject him in the same manner as if the tack were determined and the tenant had been legally warned in the terms of the foresaid Act, 1555.’⁷⁵

Or removing.

Here again the common law is followed and declared, with these exceptions, first, that the rule of law is extended to the case of desertion or virtual desertion; secondly, that the remedy is to be by summary procedure before the sheriff; and thirdly, that the amount of caution is to be restricted where more than five years of the lease have still to run at the date of the action. It is incompetent under this section to demand payment of the rent,

⁷¹ See A.S.S. from 1800, p. 52; Alexander’s Abridg. of A.S.S., 879; Graham v. Gordon, 1843, 5 D. 1207, 1210, *per* L.P. Boyle. See similar usurpations of legislative power in A.S.S., 24th June 1665, and 28th Feb. 1662.

⁷² 43 Vict. c. 12, sect. 2; 46 & 47 Vict.

c. 62, sect. 27.

⁷³ See Cameron v. M’Donald, 1804, M. 13875, on similar words in sect. 2.

⁷⁴ Form of bond of caution, 2 Jur. Styles (5th ed.), 399.

⁷⁵ As to which Act see *infra*, p. 481. It is printed as Appx. No. vii.

instead of caution,⁷⁶ but if the decree corrects the error it would appear that the objection is elided.⁷⁷ The caution does not cover more arrears than are concluded for in the action.⁷⁸

So stood the law till the year 1880, when, as has been already shown,⁷⁹ hypothec for the rent of land let to the extent of more than two acres for agriculture or pasture under leases which were not current at Martinmas 1881 was abolished. The statute which wrought this change provided, as some compensation to a landlord who was thus deprived of his hypothec, for an acceleration of the date at which an irritancy could be declared or demand for caution made, by cutting down the periods of arrear to one-half, on condition—(1) that in every case fourteen days' notice of intention to raise the action should be given; (2) that caution should be exigible only for arrears and one year's rent further; and (3) that the tenant should not forfeit any rights he might have had at an ordinary outgoing, anxious provision being made for the case of a removing between terms.⁸⁰

Hypothec
Abolition Act,
1880.

(c) *By the Agricultural Holdings Act.*

But this provision is now repealed, and in its place the 27th section of the Agricultural Holdings Act, 1883,⁸¹ enacts that

Agricultural
Holdings Act,
1883.

'in any case in which the landlord's right of hypothec for the rent has ceased and determined—when six months' rent of the holding is due and unpaid, it shall be lawful for the landlord to raise an action of removing before the sheriff against the tenant concluding for his removal from the holding at the term of Whitsunday or Martinmas next ensuing after the action is brought, and unless the arrears of rent then due are paid or caution is found to the satisfaction of the sheriff for the same and for one year's rent further, the sheriff may decern the tenant to remove and eject him at such term in the same manner as if the lease were determined and the tenant had been legally warned to remove. A tenant so removed shall have the rights of an outgoing tenant to which he would have been entitled if his lease had naturally expired at such term of Whitsunday or Martinmas. . . . The provisions of the 5th section of the Act of Sederunt anent Removing of 14th December 1756, shall not apply in any case in which procedure under this section is competent.'

The effect of these enactments is briefly this, that the Act of Sederunt is left untouched as the sole rule in regard to legal irritancies under farm leases current on 11th November 1881; and

Effect of these
enactments.

⁷⁶ Urquhart v. Mackenzie, 1824, 3 S. 84 (N.E. 56).

⁷⁷ M'Allister v. Sprot, 1825, 4 S. 353 (N.E. 357); M'Christie v. M'Kea, 1825, 4 S. 11, decides nothing.

⁷⁸ E. Morton v. Murray's Reps., 1793, M. 13872.

⁷⁹ *Supra*, p. 326; 43 Vict. c. 12.

⁸⁰ 43 Vict. c. 12, sects. 2, 3.

⁸¹ 46 & 47 Vict. c. 62.

that in respect to leases not then current, the 4th section of the Act of Sederunt (providing for irritancy on arrears of rent for two years) is still a competent remedy, though in most cases its operation will be anticipated by a resort to the modern remedy which, if and when it applies (1) supersedes the 5th section of the Act of Sederunt; (2) gives an earlier recourse to the sheriff; and, on the other hand, (3) safeguards the tenant against confiscation of improvements, &c., and against removal between terms;⁸² and (4) withholds the remedy of caution and removing from a landlord who finds his land deserted or unlaboured.

No cases can be cited in illustration of the modern statute, though some light may be obtained from the decisions which have been given in construing the Act of Sederunt. These have related mainly to two matters: the ascertainment of arrears and the nature of desertion.

Cases under
the A.S.

The title to sue rests only in a landlord to whom the arrears are due and therefore not in an heir to the land, when the arrears belong to the ancestor's executors.⁸³ The sums in arrear must consist of fixed periodical payments—including converted kain—not of illiquid obligations sounding in damages, such as liabilities for repair of fences.⁸⁴ The Act of Sederunt applies to leases from year to year, to leases kept up by tacit relocation, and to leases on the point of expiry.⁸⁵

Ascertainment
of arrears.

If the full amount—two years' rent or one year's rent, as the case may be—is due and unpaid, it is of no consequence whether it be the rent of a single crop or of two consecutive crops, or be made up of the rents of several years.⁸⁶ As the arrear must exist not merely when the action is brought but at the date of the decree,⁸⁷ a tenant might evade the operation of the Act of Sederunt, were it not that his landlord is not bound to accept partial payments.⁸⁸ The landlord does not lose his remedy under the Act of Sederunt by obtaining payment of the arrears or part thereof by legal diligence⁸⁹ or from a cautioner,⁹⁰ since such a mode of recovery says nothing in favour of the tenant's credit.

⁸² The provision for 14 days' notice in the Act of 1880 is not repeated.

⁸³ *L. Elibank v. Hay*, 1780, M. 13869, Hailes 847.

⁸⁴ *E. Morton v. Murray's Reps.*, 1793, M. 13872.

⁸⁵ *Munro v. Brown*, 1827, 5 S. 807 (N.E. 747)—there is here some confusion between the sections of the A.S.

⁸⁶ *Urquhart v. M'Kenzie*, 1824, 3 S. 84 (N.E. 56).

⁸⁷ *Campbell v. Robertson*, 1763, M. 13867; *Low v. Knowles*, 1796, M. 13873.

⁸⁸ *Low v. Knowles*, *supra*, ⁸⁷; *Caruthers v. M'Garroch*, 1780, M. 13869; B. Pr. 1251, *More's Notes*, 219.

⁸⁹ *Marshall v. Read*, 1803, *Hume* 569; B. Pr. 1251; see 2 *Bell, Leases*, 43. In *Sutherland v. Mackenzie*, 1854, 26 Sc. Jur. 466, the question arose but was not decided.

⁹⁰ *Low v. Knowles*, *supra*, ⁸⁷.

While a tenant cannot in estimating the amount of arrears claim deduction of landlord's debts paid by him without the debtor's authority,⁹¹ he may deduct debt due by the landlord to himself (*e.g.*, for improvements) ascertained though not yet constituted,⁹² and may resist an irritancy on the ground that he has been interpellated from paying his rent by the diligence of the landlord or of parties claiming through him.⁹³

The question of what amounts to desertion and want of Desertion.labouring at the proper season in the sense of the 5th section has been answered by the Court in a fair and equitable spirit. On the one hand, it plainly does not point to mere defect of stocking;⁹⁴ nor to delay in labouring caused by an unusually protracted and stormy winter;⁹⁵ nor to absence from a farm for a few weeks owing to imprisonment;⁹⁶ nor to the permanent absence of one of two joint-tenants, while the other (for whose behoof the farm was taken) resided, managed, and paid the rent.⁹⁷ On the other hand, caution must be found on peril of removing, if the tenant withdraws himself from the jurisdiction of the Courts of Scotland and the land is to a material extent unlaboured by those whom he has left behind;⁹⁸ or where a tenant becoming bankrupt flees the country and leaves his farm displenished and abandoned.⁹⁹ Since desertion and want of labouring must concur in order to let in the Act, cases of mere desertion of possession must be brought up to abandonment in order to entitle the landlord to re-entry.¹⁰⁰

The petition addressed to the sheriff in enforcement of these Form of appli-
cation.legal irritancies differs in accordance with the provisions in the Act of Sederunt or statute on which it is founded. If there be arrear of rent for two years, it prays for a finding that such is the case, for declarator that an irritancy has been thus incurred, and for an order on the defender summarily to remove and to pay

⁹¹ Carruthers *v.* M'Garroch, *supra*, ⁸⁸.

⁹² Urquhart *v.* M'Kenzie, *supra*, ⁸⁶; *contra* in a counter-claim of damages—Hamilton *v.* Cuthill, 1831, 9 S. 926 (inhibition).

⁹³ Gordon *v.* E. Fife, 1825, 4 S. 229 (N.E. 232)—heritable creditors holding decree of mallis and duties.

⁹⁴ Abercromby *v.* Finlay, 1816, Hume 587 (see there as to common law).

⁹⁵ Brown *v.* L. of C., 1758, in Ross on Removing, 104, (the incoming tenants made up for lost time, and secured a profit, which they bestowed on the ejected ten-

ants, and the latter obtained exemplary damages from the landlord).

⁹⁶ Jamieson *v.* Gordon, 1828, 6 S. 788 (for revenue penalties).

⁹⁷ Honeyman *v.* Gordons, 1806, Hume 824 (the other went to England).

⁹⁸ Arnot *v.* Bell, 1805, Hume 576.

⁹⁹ Cossar *v.* Home, 1847, 9 D. 617 (not overruled in this point by Oliver *v.* Weir's Trs., 1870, 8 M. 786).

¹⁰⁰ See an instance in E. Dalhousie *v.* Wilson, 1802, M. 15311, where the tenant granted a deed (*ultra vires*) which was substantially an assignation.

arrears of rent and taxes, with expenses.¹⁰¹ If the 5th section of the Act of Sederunt is relied on, the prayer is for an order to find caution for specified arrears and for rents for the five succeeding crops (or for the remaining rents of the lease, if its endurance be then less than five years); and failing caution for an order of summary removing, with expenses.¹⁰² If the remedy sought be that which is furnished by the 27th section of the Agricultural Holdings Act, the prayer is for removing at a specified term of Whitsunday or Martinmas, being the next term after the action is brought, with expenses. It is probably also in the discretion of the sheriff, in the other two applications here mentioned, to allow a similar postponement to the next term day, instead of ordering a removing between terms.¹⁰³

Purgation.

The doctrine of purgation applies to all these legal irritancies. That is to say, extract of the decree of declarator provided for by the 4th section of the Act of Sederunt cannot go out, if, prior to its date, payment has been made of the arrears due. Extract of the decree ordering caution on pain of removing cannot go out if prior to its date the arrears are paid, or the desertion or neglect of the farm has *bonâ fide* ceased. And, similarly, it is suggested, a tenant cannot be ejected under the provisions of the Agricultural Holdings Act, if before the decree of removing is extracted he has paid up the arrears, or found caution for them and for one year's rent further.

Time for purgation.

At common law and before the Act of Sederunt, the first of these rules was established;¹⁰⁴ and the second was carried into effect by allowing the tenant a fixed period within which to purge before caution was ordered, or, when the order to find caution was pronounced, by superseding extract for a given time.¹⁰⁵ Since the Act of Sederunt these rules have been given effect to by purgation being allowed before extract;¹⁰⁶ provided, of course, the whole¹⁰⁷ and not merely part¹⁰⁸ of the arrears is

¹⁰¹ Lees, Styles (2nd ed.), 209. See a case in which a thrashing-mill was taken over in part payment of arrears—Sharpe v. Smyth, 1832, 11 S. 38.

¹⁰² Lees, 297.

¹⁰³ See M'Niven v. Murray, 1847, 9 D. 1138; Williamson v. Johnstone, 1848, 11 D. 332; Stewart v. Watson, 1864, 2 M. 1414, for analogous cases of summary removing.

¹⁰⁴ Burden v. Dick, 7184, 7234, 15306; Bankt. 2.9.23; Ersk. 2.6.44; see Seton v. Seton, 1610, M. 7201.

¹⁰⁵ Hamilton v. Tenants, 1629, 1 B.S. 377; Phin v. Phin, 1682, M. 7234, 15305; Burden v. Dick, *supra*,¹⁰⁴; Alexander v. Jackson, 1744, M. 15306; Blair v. Brown, 1671, M. 2728, is not *hujus loci*.

¹⁰⁶ Knowles v. Bings, 1826, 4 S. 530 (N.E. 538); M'Christie v. M'Kea, 1825, 4 S. 11 (N.E. 11); M'Donald v. Jardine, 1825, 4 S. 227 (N.E. 230).

¹⁰⁷ Glen v. M'Kenzie, 1824, 2 S. 763 (N.E. 634); Knowles v. Bings, *supra*,¹⁰⁶.

¹⁰⁸ Carruthers v. M'Garroch and other cases, *supra*,⁸⁸.

paid up or consigned,¹⁰⁹ after allowing for payments to account duly accepted and counter-claims duly instructed. After extract, purgation comes too late, and this rule is justly held to be *à fortiori* of the similar rule of irritancy of feus *ob non solutum canonem*, since the loss to a tenant is usually less than to a feuar, as the rent ordinarily represents the full annual value of the land, while the feu-duty frequently does not.¹¹⁰ This rule has never been doubted where the decree extracted has been obtained *in foro*; so that an offer of caution in the Court of Session in a suspension of an extracted decree is not timeously made.¹¹¹ Where the extracted decree is obtained in absence, the rule holds where the defender has been properly cited and has had due opportunity of purging before decree is pronounced.¹¹² The specialties in the cases cited do not affect the rule of law.¹¹³

(d) *By Sheriff Courts Act, 1853.*

The remaining legal irritancy in our law is an application of the irritancy of feus *ob non solutum canonem* for two years to 'leases for a longer endurance than twenty-one years, where the subjects let do not exceed £25 in annual value.'¹¹⁴ The landlord has then the like remedies in the Sheriff Court against his tenant, in case of the non-payment of rent as are given to a superior against his vassal. The action sets forth the value of the subject and the arrear, and concludes for removing. The warrant, when granted, is executed at the first term of Whitsunday or Martinmas, which shall occur four months after its issue, and has the effect of a decree of irritancy *ob non solutum canonem*;¹¹⁵ and purgation may be made by payment of the arrears and expenses. Challenge of the landlord's title if not instantly

In long leases of small subjects.

¹⁰⁹ *M'Donald v. Jardine*, *supra*, ¹⁰⁶. Even intimated consignation in hands of a third party has in certain circumstances been held equivalent to payment—*Campbell v. M'Allister*, 1777, M. 7252, and Appx. Irritancy, 1, Hailes 72.

¹¹⁰ Bankt. 2.9.23; 2 Ross' Lect. 498; see Ersk. 2.6.41, note; 2 Bell, Leases, 17; and see the learning on irr. *ob non sol. can.* in *Sandeman v. Sc. Property Investment Co.*, 1883, 10 R. 614, rev. 12 R.H.L. 67; *Cassels v. Lamb*, 1885, 12 R. 722.

¹¹¹ *Hunter v. Badenoch*, 1800, M. Appx. Removing, 1; *Kinloch v. Maccomie*, 16th June 1812, F.C. 681. The decision in *M'Christie*, *supra*, ¹⁰⁶, is not *contra*.

¹¹² *Duncan v. Welsh and Duncan v. Thomson*, 1805, Hume 575 (farm relet and therefore some *rei interventus*); *E. Hopetoun v. Low*, 1806, Hume 577 (though rent recovered and secured by poiding and sequestration); *Kennedy v. Alison*, 1807, Hume 578 (ejection, but tenant allowed to remain *ex gratiâ* for a year).

¹¹³ And in *Campbell v. M'Allister*, *supra*, ¹⁰⁹, and *Innes v. Clark*, 1780, M. 13871, Hailes 876, where the proceedings were suspended and reduced, the decrees being unsound.

¹¹⁴ 16 & 17 Vict. c. 80, sect. 32 (Sheriff Courts Act).

¹¹⁵ Therefore involving abandonment of the claim for arrears.

verifiable must take the form of a declarator in the Court of Session within a year of the removal. Though the scope of this irritancy is very general, it will in practice be found to apply mainly to building leases of small subjects.¹¹⁶

B. CONVENTIONAL IRRITANCIES.

It is impossible to give, and it would be useless to attempt, an exhaustive enumeration of the conventional irritancies which may be found in leases, since the parties in each case may, if they choose, add this sanction to any of the express obligations of the lease and enforce it in case of breach. The only useful plan seems to be to deal with such irritancies as have actually come before the Court. Of these, the two leading groups will be dealt with separately, and the others classed as miscellaneous. And the exposition naturally falls under these two heads—the usual irritancies, and the mode of enforcing them.

I. *The usual Irritancies.*

1. *Irritancy for Non-Payment of Rent.*¹¹⁷

Chiefly in
leases of rural
tenements.

The object of this irritancy is to curtail the period of arrear of rent, which at common law or under the Act of Sederunt of 1756, entitles a landlord to get rid of his tenant. In the case of agricultural leases dated subsequently to Martinmas 1881, this object is adequately (and, it is thought, as stringently as the Court would be inclined to sanction) attained by the 27th section of the Agricultural Holdings Act,¹¹⁸ which gives the landlord a right to remove his tenant or obtain caution when six months' rent of the holding is due and unpaid. In cases to which that provision does not apply a conventional irritancy may be usefully inserted in leases for years. As has been shown elsewhere,¹¹⁹ the same object is more readily attained by procedure in virtue of the landlord's right of hypothec, where security for the said right is summarily obtainable under pain of removing. So that in leases of dwelling-houses and other urban tenements, it has not been customary to insert a special irritancy for non-payment of rent.

Form of
clause.

In old leases, the usual form of irritancy was in case that two years' (or terms') rent be allowed to run into the third 'unpaid.'¹²⁰ It was settled after some controversy that the irritancy might be here taken advantage of on the expiration of two years (or terms) in arrear without waiting for the ter-

¹¹⁶ The authorities on *irr. ob non sol. can.* are referred to, *supra*, ¹¹⁰.

¹¹⁷ It seems the better course to confine the phrase *irr. ob non solutum canonem* to feus,

¹¹⁸ 46 & 47 Vict. c. 62, *supra*, p. 461.

¹¹⁹ *Supra*, pp. 212, 351.

¹²⁰ The phrase is still known to conveyancers.

mination of a third year or term.¹²¹ Or, the clause ran in more modern fashion, thus: 'if one year's rent shall remain unpaid 'after the expiration of the term of payment.'¹²² Care is always taken to declare the irritancy not to be purgeable. In one reported case, the legal irritancy was expressly relaxed. The tack was a perpetual one, and irritancy was stipulated to follow *ipso facto* on failure to pay the tack-duty for three years. Failure to pay and desertion of the premises were succeeded by re-entry on the part of the landlord and possession by him for twelve years. One of the alleged tenants (heirs of a former tenant) then raised an action of declarator, removing, and accounting; but the landlord was assoilzied in respect that the desertion by the tenants entitled the landlord to enter *brevi manu*. If, however, the heirs had been ignorant of their rights and had appeared and made claim soon after the desertion and forfeiture, the landlord would probably not have been permitted to rely on his re-entry without warrant.¹²³ The remedy of irritancy is only available when there is arrear for a sufficient period at the date of the action.¹²⁴

The modern clause of style in agricultural leases provides for irritancy without declarator or process of law, and without pre-judice to the landlord's claim for past-due or current rents in case the tenant 'shall allow one term's rent to remain unpaid 'when the next term's rent shall have become due'¹²⁵—a less stringent remedy than that which is provided by the Agricultural Holdings Act, and therefore doomed to disappear. Mineral leases vary considerably in the terms in which this irritancy is couched. Irritancy is, in the Style Book, variously incurred 'on failure to pay the fixed rents or balance of lordships within 'six months after the same shall respectively become due,'¹²⁶ or if there be arrear thereof for 'two consecutive years'¹²⁷ or terms;¹²⁸ or if there be arrear of 'four terms' rent.'¹²⁹

Effect of Agricultural Holdings Act.

Mineral leases.

2. Bankruptcy of Tenant.

The familiar term is retained for the sake of convenience. But it is proposed to group under this heading all those cases in

No effect at common law as an irritancy.

¹²¹ *Ly. Barrach v. Reisgill Tacksman*, 1729, M. 7186, following *L. Gosford*, 1587, M. 7181, and ignoring the distinction in *Seton v. Seton*, 1611, M. 7184; *Smith v. E. Marishal*, 1673, M. 7185. See *Bankt.* 2.9.23; 2 *Ross' Lect.* 498.

¹²² *Fraser v. Ms. Abercorn*, 1835, 14 S. 77; 2 *Ross' Lect.* 497.

¹²³ *Ogilvie v. Duff*, 1834, 12 S. 857.

¹²⁴ *Hog v. Morton*, 1825, 3 S. 617 (N.E. 433).

¹²⁵ 1 *Jur. Styles*, 579, 588, 603. As to fishing lease, see *ibid.* p. 697.

¹²⁶ *Ibid.* 619.

¹²⁷ *Ibid.* 634.

¹²⁸ *Ibid.* 675.

¹²⁹ *Ibid.* 659.

which a lease makes provision for its termination if and when the tenant stands before the world as involved in pecuniary embarrassments. It is possible to separate a consideration of this clause from the learning on the general effect of a tenant's bankruptcy;¹³⁰ and it is useful to make the separation, since everything turns on the clause itself, and the irritancy is its sole object. It is only necessary to premise that neither the insolvency of a tenant nor his notour bankruptcy, nor landlord's sequestration nor sequestration in bankruptcy, nor decree of *cessio*, nor the granting of a trust-deed for creditors gives the landlord a right to annul a lease, unless there be stipulation to that effect.

Form of clause. The clause is variously worded. The hypothesis may run thus: 'If the tenant and his foresaids shall at any time during ' this lease become bankrupt or be sequestered, or shall voluntarily divest themselves of their estate or effects by trust-deed ' for behoof of creditors or otherwise,'¹³¹ or (alternatively) ' shall ' possess the lands hereby let either directly or indirectly for the ' benefit of their creditors though nominally for themselves;'¹³² or, more briefly, 'in the event of bankruptcy or declared insolvency;'¹³³ or of bankruptcy or sequestration or of poinding for debt above a certain minimum sum, or of landlord's sequestration.¹³⁴ And the result is variously stated, as for instance that 'it shall be in the ' power of the proprietor to put an end to this lease without any ' declarator or process of law to be used for that effect and ' without prejudice to the proprietor's claim for past-due and ' current rents;'¹³⁵ or that ' the lease shall thereupon *ipso facto* ' come to an end, at the option of the proprietor, without any ' declarator,' &c.¹³⁶

Cases. In the interpretation of such of these clauses as have been submitted to the Court, some points have been decided which are of general interest. There is no general rule of construction in favour of or hostile to either party. The Court, as in the interpretation of most documents, endeavours to arrive at the intention of the parties as appearing from the terms of the clause.¹³⁷ A clause declaring that 'in case of the bankruptcy of ' the tenant his creditors shall have no power under it to appoint ' a manager, or in any manner to interfere with the subjects let,

¹³⁰ As to which, *infra*, chap. xxiv.

¹³¹ 1 Jur. Styles (5th ed.), 578, slightly varied, p. 588.

¹³² Ibid. 603, 682.

¹³³ Ibid. 619.

¹³⁴ Ibid. 635,

¹³⁵ Ibid. 579, 589, 603, 635, 683.

¹³⁶ Ibid. 619, 659, 675, 697 (the variations are slight).

¹³⁷ See Bankt. 2.9.23; Ersk. 2.6.44; Brodie's note to St. 2.9.43; Moncreiff v. Hay, 1842, 5 D. 249, 253, 259.

'or the tenant himself to continue his possession directly or indirectly for behoof of his creditors,' does not infer an irritancy.¹³⁸

In all cases the option to terminate or keep up the contract rests with the landlord alone.¹³⁹ It is not held to be abandoned by a mere reference of all questions between him and his tenant, if by declinature of the arbiter (or, it is thought, through any other cause for which the landlord is not responsible), the reference falls through.¹⁴⁰ The option must be declared within a reasonable time; and where the stipulation was that the landlord should be entitled to remove his tenants within six months after their bankruptcy, an intimation of intention to re-enter made within six months of their sequestration was held to be a sufficient declaration of the option.¹⁴¹ If from some accidental pressure of circumstances a tenant becomes bankrupt and immediately thereafter is in a position to retrieve the misfortune, the Court may hold that he has not incurred an irritancy in the sense of the ordinary irritant clauses.¹⁴² It is different if there be proof of total incapacity to carry on the lease; and it is no answer to a demand for a removing to allege that in the meantime the tenant has obtained his discharge under a composition contract,¹⁴³ or has been inhibited by a creditor.¹⁴⁴

In landlord option.

Declared in reasonable time.

Temporary embarrassment.

There is no difficulty in ascertaining whether an irritancy has been incurred, when the fact on which it is founded is a trust-deed,¹⁴⁵ or notour bankruptcy,¹⁴⁶ or sequestration in bankruptcy,¹⁴⁷ or landlord's sequestration,¹⁴⁸ or cessio; and where there is only a single tenant. But where, as sometimes happens, the fact founded on is the tenant's insolvency, doubts may well arise as to the existence thereof. In one case, it was clearly made out that the tenant was insolvent, since there had been landlord's sequestration, a meeting of creditors called by him, at which his inability to satisfy their claims was admitted, and a sale of his

Insolvency.

¹³⁸ Bruce v. Kinloch, 1831, 9 S. 831.

¹³⁹ Kinloch v. Mansfield, 1836, 14 S. 905 (sequel of last case). See there as to the evidence of exercise of the option.

¹⁴⁰ Lindsay v. Hogg, 1855, 17 D. 788. In so far as this case goes beyond this statement, it is open to grave doubt.

¹⁴¹ Tennent v. M'Donald, 1836, 14 S. 976; see Rae v. Henderson, 1837, 15 S. 653.

¹⁴² Anstruther v. Greenshields, 1855, 18 D. 59; see Scott v. Wotherspoon, 1829, 7 S. 481; Horn v. M'Lean, 1830, 8 S. 329.

¹⁴³ Gordon, 1805, M. App. Tack, 11; Hall v. Grant, 1831, 9 S. 612; Tennent v. M'Donald, *supra*, ¹⁴¹.

¹⁴⁴ Fraser v. M. Abercorn, 1835, 14 S. 77; and see Rankin v. M'Lachlan, 1864, 3 M. 128; Lyon v. Irvine, 1874, 1 R. 512.

¹⁴⁵ Hall v. Grant, *supra*, ¹⁴³.

¹⁴⁶ Forbes v. Duncan, 2nd June 1812, F.C. 662.

¹⁴⁷ See cases in last paragraph.

¹⁴⁸ Stewart v. Watson, 1864, 2 M. 1414.

More than one
tenant.

effects.¹⁴⁹ In another case, where a sale of sequestrated stocking paid the arrears and nearly liquidated the current rent, it was considered very doubtful whether insolvency was made out.¹⁵⁰ And difficulty may arise if there are more tenants than one. Where, of four tenants, three became bankrupt, and the fourth, who remained solvent, had quitted the concern (a dye-work), though without withdrawing his name from the lease, it was decided quite soundly that the lease had been wholly forfeited.¹⁵¹ But where a lease was granted to two persons and their respective heirs and successors, with irritancy 'in the event of the bankruptcy of the 'said tenants,' and one of the tenants became bankrupt and renounced the lease, and the other died, as was alleged, insolvent, it was held that the representatives of the latter were entitled to possession of the whole subjects let, since, so far as their ancestor was concerned, there had been no forfeiture.¹⁵²

Subjects—how
to be given
over.

A case already cited affords an illustration of a special provision being made for the state of the subjects when resumed. The clause gave the landlord the 'sole right to the lands in the state 'they might then [at the first term subsequent to the insolvency] 'be in,' and to the straw and chaff of all the crop then on the ground or in the farmyard. The said first term was a Martinmas. It was held that the farm must be given up then, including parts of it sown with wheat and grass seeds, without any claim for indemnification from the landlord, since the terms of the clause were quite explicit.¹⁵³

3. *Miscellaneous.*

The other clauses to which an irritancy is sometimes appended require little notice. They have all been referred to in more appropriate parts of this treatise. The chief of them—that which seeks to insure residence by the tenant on the subjects let—is part of the law of possession under leases.¹⁵⁴ An obligation to possess a farm with the lessee's own stock falls naturally under the law of hypothec;¹⁵⁵ and prohibitions against assigning and subletting have been already under consideration.¹⁵⁶

II. *Mode of Enforcement.*

Declaratory—
when dis-
pensed with.

It is now settled that where the fact on which an irritancy

¹⁴⁹ *Moncreiff v. Hay*, *supra*, ¹³⁷. On such questions see Goudy on Bankruptcy, 15 *seq.*, and L. Alloway's obs. in the next case.

¹⁵⁰ *Hog v. Morton*, 1825, 3 S. 617 (N.E. 433).

¹⁵¹ *Tennent v. M'Donald*, *supra*, ¹⁴¹.

¹⁵² *Young v. Gerard*, 1843, 6 D. 347 ;

and see the converse case—*Burns v. Martin*, 1885, 12 R. 1343, rev. 14th Feb. 1887.

¹⁵³ *Moncreiff v. Hay*, *supra*, ¹³⁷.

¹⁵⁴ *Supra*, p. 213.

¹⁵⁵ *Supra*, p. 351. *Stonefield v. M'Arthur*, 1800, M. Appx. Removing, 3.

¹⁵⁶ *Supra*, p. 161 ; *Lyon v. Irvine*, 1874 1 R. 512.

depends is admitted, or is instantly verifiable (as, for instance, in the ordinary case of sequestration in bankruptcy,¹⁵⁷ notour bankruptcy,¹⁵⁸ landlord's sequestration,¹⁵⁹ or the granting of a trust-deed for creditors¹⁶⁰), and the lease contains the usual addendum that declarator or other process at law should not be necessary, a competent and the proper form of enforcing the forfeiture is by action of removing before the sheriff without declarator.¹⁶¹ It seems to be established, further, that the addendum referred to is not necessary to get rid of the necessity for a declarator and consequently for action in the Court of Session;¹⁶² and that it is enough if there be a provision for *ipso facto* nullity at the landlord's option.¹⁶³ And a sheriff's interlocutor is not vitiated if in the findings of fact it used declaratory words.¹⁶⁴ If, on the other hand, the decisive fact is not admitted, and (as in the case of insolvency) requires to be made out by a proof at large, a declarator must be deemed necessary to support the conclusion for removing.¹⁶⁵ An attempt has been made to draw a distinction between irritancies which are fair conditions of a lease and irritancies which are penal,¹⁶⁶ and to found thereon a denial of the sheriff's jurisdiction in the latter case. But the distinction is non-existent, for every irritancy runs the risk of being penal, and it is barren, since the question could not be decided in the outset of a suit. The modern doctrine is that all irritancies will be enforced according to their tenor, as read in no judaical spirit, but that the Court (inferior or supreme) may step in to prevent gross abuse or oppression.¹⁶⁷ While in the case of renunciation

Removing in Sheriff Court.

Fair and penal irritancies.

¹⁵⁷ Gordon, 1805, M. Appx. Tack, 11 : Scott v. Wotherspoon, *infra*, ¹⁶⁶.

¹⁵⁸ Forbes v. Duncan, 2nd June 1812, F.C. 662; Taylor v. Boyle, 1824, 2 S. Ap. 30 (mines).

¹⁵⁹ Stewart v. Watson, 1864, 2 M. 1414, and case of E. Mansfield v. Henderson, 2nd March 1815, F.C. 301, therein expounded.

¹⁶⁰ Hall v. Grant, 1831, 9 S. 612.

¹⁶¹ In Lyon v. Irvine, *supra*, ¹⁵⁶, procedure before the Judge Ordinary was expressly provided for. The older cases left the question doubtful—Stevenson v. Barclay, 1629, M. 2725; Boswel v. Tenants, 1631, M. 2726—and in 2 Bell, Leases, 16, declarator is made the rule.

¹⁶² Except in so far as the extension of the sheriff's powers to grant declarator as to heritable right or title in regard to

subjects worth £50 annually or £1000 of capital, may be held to extend to such questions—40 & 41 Vict. c. 50, sect. 8.

¹⁶³ Gordon; Forbes, *supra*, ¹⁵⁷, ¹⁵⁸. In Hall; E. Mansfield, ¹⁵⁰, ¹⁵⁹, the clause ignored declarator and expressly provided for removing.

¹⁶⁴ Hall v. Grant, *supra*, ¹⁴³.

¹⁶⁵ Hog v. Morton, *supra*, ¹⁵⁰. In Moncreiff v. Hay; *supra*, ¹⁵⁷, the sheriff made what were in effect declaratory findings; but when an ulterior question emerged no one had an interest to take exception.

¹⁶⁶ *Per* L. Corehouse in Scott v. Wotherspoon, 1829, 7 S. 481, approved by L. Balgray in Horn v. McLean, 1830 8 S. 329.

¹⁶⁷ Stewart v. Watson, *supra*, ¹⁵⁹.

Not between
terms.

of a lease by the tenant (involving instant loss of title to possess) the landlord is entitled to demand instant removing,¹⁶⁸ it seems to be in the discretion of the sheriff or of the Court to refuse a removing between terms and to decern that the tenant shall quit possession at the ensuing legal term or terms.¹⁶⁹ And if removing at a term is provided for in the irritant clause—as by a stipulation that it shall proceed ‘in the same manner as if the lease were expired’—a decree for instant removal is unwarranted and will be suspended.¹⁷⁰ Forms of summonses appropriate for the enforcement of conventional irritancies are given in the Style Books.¹⁷¹

Not purgeable.

It is now settled law that a conventional irritancy, so long as it is not a mere copy of a legal irritancy, once it is incurred cannot be purged by payment of the arrears of rent¹⁷² (where arrear is the cause of forfeiture), or cesser of the status or diligence or other fact on which the landlord founds.¹⁷³ The Court may step in to prevent a misuse of the irritancy, as where there was an excusable error on the point whether each of several lessees was liable for the whole or only for an undefined proportional part of the rent,¹⁷⁴ or the tenant or persons in his right had been wrongfully ousted from possession,¹⁷⁵ or where payment had been offered to the landlord or to some one authorised by him to levy rent,¹⁷⁶ or where, the irritancy depending on the landlord’s sequestrating in virtue of his hypothec, that remedy was sprung on the tenant without due notice.¹⁷⁷ But where, in a case of this last sort, rent was due on 29th September; sequestration was obtained on 3rd October; action of removing in pursuance of the irritancy was raised on 23rd November; and the rent was paid next day—it was held that purgation came too late, the conduct

¹⁶⁸ *Williamson v. Johnstone*, 1848, 11 D. 332.

¹⁶⁹ *Stewart v. Watson*, *supra*, ¹⁵⁹; *Waugh v. Nisbett*, 1882, 19 Sc.L.R. 427.

¹⁷⁰ *Lyon v. Irvine*, 1874, 1 R. 512 (amendment of the decree being unfortunately incompetent in a suspension), and see *D. Hamilton v. Warnock*, 1872, *Guthrie’s Dec.* 294.

¹⁷¹ 3 *Jur. Styles* (3rd ed.), 67; *Lees, Sheriff Court Styles* (2nd ed.), 211.

¹⁷² *Sinclare v. Sinclair*, 1672, 1 B.S. 659 (though the landlord arrested future rents); *Clark v. Bennet*, 1759, M. 7237; *Finlayson v. Clayton*, 1761, M. 7239.

¹⁷³ *Cases of Gordon*, ¹⁵⁷, *Hall*, ¹⁶⁰, *Ten-*

ment, ¹⁴¹, compared with *Anstruther*, ¹⁴².

¹⁷⁴ *Old College, Aberdeen v. E. Northesk*, 1678, M. 7230 (teinds, the purgation ordered was *in duplum*). In *Dick v. Skaills*, 1706, 4 B.S. 642, no irritancy had really been incurred.

¹⁷⁵ *Dick v. Skaills*, *supra*, ¹⁷⁴.

¹⁷⁶ *L. Wedderburn v. Nisbet*, 1612, M. 6322, 7181. *L. Torphichen v. L. Pitfodels*, 1610, M. 7291 (feu) would not now be followed. In such a penal matter parole would probably now be admitted, contrary to *Romano v. Nisbet*, 1609, M. 12355; *Calpie v. Kennedy*, 1631, M. 12360 (feu).

¹⁷⁷ *Obiter* in following case.

of the landlord being quite reasonable, the notice fair, and the interval between sequestration adequate. And it was pointed out that if purgation had been allowed after the sequestration, either by payment of money down or by recovering the rent by sale of the crop or stocking, there might be a recurrence of similar events during the whole course of the lease.¹⁷⁸

¹⁷⁸ *Stewart v. Watson*, 1864, 2 M. 1414.

CHAPTER XXI.

TERMINATION AT ISH : ORDINARY REMOVINGS.

IN this chapter an attempt will be made to set forth the mode in which the dissolution of the contract of lease is worked out at the natural termination of the relation between landlord and tenant, or, if there be a break or breaks, at the most remote ish contemplated. If at the close of the contract the tenant removes without demur, nothing remains to be done, except to settle the claims of the parties *hinc inde* with regard to repairs, improvements, deterioration, &c., in the mode described in earlier parts of this work. If, however, the tenant declines to remove voluntarily, the aid of the Courts of the country must be called in to compel him to quit. The action is known as an Action of Removing. It is called an ordinary removing, as opposed to the extraordinary removings described in the foregoing chapter. And it may be solemn or summary according as the remedy requires greater or less deliberation in its operation.

Voluntary removing at ish.

Removings in form of law.

Solemn and summary.

I. PROCEDURE WHERE THERE IS EXPRESS OBLIGATION TO REMOVE OR AN EQUIVALENT.

Clause of removal. In formal leases, the following clause (or some equivalent) is invariably inserted :—

And the tenants bind and oblige themselves and their foresaids to flit and remove themselves, their wives, bairns, families, servants, goods, and gear furth of and from the subjects hereby let at the expiry of this lease, and that without any previous warning or process of removing to be used against them to that effect.¹

And sometimes there is added this clause—

And in case of their failing to do so, the tenants bind and oblige themselves and their foresaids to pay to the landlord the yearly rent of £ sterling for every year or part of a year they shall occupy any part of the

¹ 1 Jur. Styles (5th ed.), 569, 579, 589, 596.

said lands and others after the respective terms of removal above specified.²

Unless there be something special in the wording of this addendum, it is read not as a licence to the tenant to sit on at the increased or penal rent against his landlord's will, but as a provision entirely in the landlord's favour enabling him more easily to enforce a removing at the term contemplated.³

The obligation to remove may also be contained in a writing, other than the lease,⁴ executed usually within some short period before the time of removing.⁵ The latter form is the earlier in date,⁶ but has been practically superseded by the almost invariable use in solemn leases of clauses of removing such as the above.⁷ The 'letter of removal,' as it is sometimes called, may form part of an arrangement for a short prorogation of the lease, and in that case terms which would probably not have been held as sufficient to absolve the other party from proceeding in a formal manner have been given effect to, as part of a mutual contract acted on by both parties.⁸ The granter of such a letter must be in a position to grant it effectually; so that assignees, whose right had been intimated to and approved by the landlord and who paid the rent, though they allowed their cedent—originally the tenant—otherwise to act as still tenant, were not bound by their cedent's obligation to remove.⁹

There may be a converse obligation by the landlord to permit the tenant to remove without the usual formalities.

These obligations may be instructed by writ. They may also be proved by oath of party; *i.e.*, the oath of the landlord where the tenant desires to remove and thus escape the obligations involved in tacit relocation;¹⁰ and the oath of the tenant where the landlord desires to oust him at a particular term, and to

Letter of removal.

Landlord's licence to remove.

How proved.

² Ibid. 579, 604, 620.

³ Cross v. Muirhead, 1813, Hume 860; Campbell v. M'Laurin, 1814, Hume 864. In both cases this rule was enforced in spite of certain specialties pointing the other way; cf. Gold v. Houldsworth, 1870, 8 M. 1006; Mackintosh v. Macdonell, 1798, M. Tack, Appx. 5.

⁴ Not requiring a stamp—Maclaren v. Ms. Breadalbane, 1831, 10 S. 163; Bain v. Stewart, 1852, 14 D. 1007.

⁵ Ibid., and Brown v. Peacock, 1822, 1 S. 359 (N.E. 337); Heron v. Rollo, 1825, 4 S.

118 (N.E. 119).

⁶ Cr. 2.9.1; St. 2.9.34, 38; Bankt. 2.9.37, 47; Ersk. 2.6.54; Ross, Removing, 163.

⁷ St. *supra*, ⁶; Spottisw. Styles, 365; Ross, Removing, 91.

⁸ M'Nair v. L. Blantyre's Tutors, 1833, 11 S. 935 ('I must just submit to quit').

⁹ Bett v. Murray, 1845, 7 D. 447 ('a sharp advantage').

¹⁰ Carlisle v. Lawson, 1734, Elch. Tack, No. 1, and referred to in Edmonston v. Bryson, *infra*, ¹¹.

prevent the supervening of tacit relocation.¹¹ But a verbal promise by a tenant to quit, or by a landlord to allow his tenant to sit in spite of process to remove him or to quit without warning, cannot be proved by parole;¹² for to admit such proof would be a dangerous tampering with those precautions against hasty action, which the law has set up. Thus decree of removing was refused where the only facts founded on by the landlord were that the tenant admitted that he had declared he would not keep the lands unless he got an abatement of rent, and that he knew of advertisements for a new lease being published;¹³ and where a farm was advertised and let to a new tenant with the cognisance of the old tenant, who showed the other over the farm, sold a considerable part of the stock, and dismissed a number of the farm servants.¹⁴ But the party who resists a removing (whether landlord or tenant) may be barred *rei interventu* from resiling from his informal promise, *e.g.*, where something so material has followed on it, as quitting part of the subjects,¹⁵ receiving payment in consideration of removing, getting another farm on that footing, being allowed to depart from a prescribed course of cropping,¹⁶ or possessing on a new bargain of which an obligation to remove forms a part.¹⁷

Warning dispensed with.

The obligation to flit and remove 'without warning or process of law' is literally construed and enforced, in the sense that warning is unnecessary and that the landlord may apply for summary ejection, in all cases where the obligation, whether contained in the lease¹⁸ or otherwise instructed,¹⁹ is dated within the year of removal. If there be more than one term of removing it will be sufficient that the date is within the year preceding the earliest of them.²⁰

¹¹ L. Craigmillar v. Chalmers, 1639, M. 6090, 12308; Edmonston v. Bryson, 1744, M. 12415, 13884, Elchies, Tack, No. 10; Heddle v. Baikie, 1841, 3 D. 370, rev. 15 Sc. Jur. 559 (assumed); B. Pr. 1271, Ivory's note to Ersk. 2.6.50.

¹² Balf. 356; St. 2.9.36; Bankt. 2.9.37; Ersk. 2.6.44; B. Pr. 1271; Shaw v. Palmer, 1605, M. 12301; Cs. Argyll v. Sheriff of Moray, 1583, M. 12300.

¹³ E. Haddington v. Campbell, 1693, 4 B.S. 86 (though he acted 'fraudulently, at least craftily').

¹⁴ Gordon v. Bryden, 1803, M. 13854.

¹⁵ Jamieson v. Thomson, 1802, Hume 807.

¹⁶ 2 Bell, Leases, 117, citing unreported cases; Ivory's Note to Ersk. 2.6.50.

¹⁷ Blain v. Ferguson, 1840, 2 D. 546. The case of D. Argyle v. Russel, 1799, M. Appx. Removing, 2, probably turned on the real tenant having been warned; if not, it seems to be overruled by the later cases.

¹⁸ Brown v. Peacock, 1822, 1 S. 359 (N.E. 337); Paxton v. Slack, 1803, Hume 568.

¹⁹ Heron v. Rollo, 1825, 4 S. 118 (N.E. 119); MacLaren v. M. Breadalbane, 1831, 10 S. 163.

²⁰ Brown v. Peacock, *supra*, 19.

The same literal construction seems originally to have been put on such obligations in all cases.²¹ But before the end of the seventeenth century it had come to be settled that some intimation must be made before proceeding to an ejection; and the shortest period suggested as fair and safe, though not perhaps compulsory, was forty days before the term;²² and this *dictum* of Lord Stair may be taken as embodying the rule of law as then established.²³ In the middle of the next century, this rule was declared and the procedure ascertained by the first section of the Act of Sederunt of 14th December 1756,²⁴ in regard, at least, to leases of landward subjects. Under that section the heritor or other setter of a tack may upon such an obligation obtain letters of horning and charge the tenant thereon forty days before Whitsunday, in the last year of the tack or in any year thereafter; and, on production of due execution thereof, the sheriff is authorised and required, within six days after the term of removal, to eject the tenant. This enactment was construed as embodying the only and invariable rule of removing in cases to which the Act of Sederunt applied.²⁵ But the Act of Sederunt need not be expressly libelled, since it is only declaratory of the law.²⁶

Not if obligation is beyond the year.

Notice under A.S. 1756, sect. 1.

The procedure in accordance with this section of the Act of Sederunt may be briefly described.²⁷ Along with the lease a bill is presented to the Court of Session praying for letters of horning conform to the Act of Sederunt. The letters are issued charging the tenant to remove on pain of liability for violent profits. On or after Whitsunday the executed horning is presented to the sheriff along with a petition for warrant to eject.²⁸ The warrant is executed in presence of the landlord or a procurator for the landlord and witnesses, by turning out the tenant and his belongings, extinguishing the fires, and delivering the keys to the landlord or procurator. A notary is usually present

Procedure under the A.S.

²¹ Cr. 2.9.11; *Freeland v. Monteith*, 1586, M. 13877; *Craighall v. Kinninmonth*, 1610, M. 13879 (though there had been more than a year's *mora*).

²² St. 2.9.38.

²³ See Bankt. 2.9.57; Ersk. 2.6.50; Ross, Removing, 91; *E. Eglinton v. Fulton*, 1771, M. 13886. Cf. *Dicksons v. Tweedie*, 1736, M. 13880 (where it may be gathered that there had been forty days' notice), with *Bartlet v. Stewart*, 1742, M. 13882, where there was no notice.

²⁴ Printed, *infra*, Appx. No. viii.

²⁵ *Perth Mags. v. Andrew*, 1798, Hume 562; *Lockhart v. Twaddle*, 1800, Hume 564; cf. *dicta* in *E. Eglinton v. Fulton*, *supra*, ²³.

²⁶ *Stevensons v. Baird*, 1821, 1 S. 84 (N.E. 87); More's Notes, 260.

²⁷ The authorities are 3 Jur. Styles (1st ed.), 634, 687; Ross, Removing, 92, 164; More's Notes, 260; 2 Dallas, 84; St. 2.9.45, 4.47.36; 2 Bell, Leases, 77; Ersk. 4.3.17; Bankt. 4.41.17.

²⁸ Or this may be got from the Court of Session; and on it the sheriff issues a precept to remove.

to take instruments and inventories. No return of the execution is made. The remedy against evasion by suffering a third party to intrude is a summons of succeeding in the vice.²⁹ The tenant can object to the proceedings in no other form than by suspension.³⁰ The procedure before the sheriff is summary, answers being usually ordered to be given in within forty-eight hours after service of the petition for warrant to eject.³¹

Procedure
under Sheriff
Courts Act,
1853.

Probative
lease with ish.

These remedies are not abrogated; but they are superseded in practice by the important enactments contained in the 30th and 31st sections of the Sheriff Courts Act of 1853.³² These sections contain a convenient imitation of the system of decree following on a consent to registration for execution, and contemplate two different cases. The 30th section applies to probative leases of lands or heritages which specify a term of endurance, this definite ish being regarded as equivalent to an obligation then to remove. Such a lease or an extract thereof is armed with the same force and effect as an extract decree of removing obtained in any ordinary action of removing³³ by the lessor, or any one in his right against the party in possession under the lease; and such lease or extract shall, along with a written authority signed by the landlord or his factor or agent, be a warrant to any sheriff-officer or messenger-at-arms to remove and eject the party in possession on the elapse of the term specified; provided notice to remove shall have been given at least forty days before the ish (or the ish first in date if there be more than one), personally or at his ordinary dwelling-house or through the post-office in the statutory form by an officer. A certificate of service, endorsed on the lease or extract, signed by an officer, and attested by one witness (also in a statutory form), or an endorsed acknowledgment signed by the party in possession or his agent, is made sufficient evidence of the service. The removal or ejectment must take place not later than six weeks after the ish (or last ish). And liberty to suspend is saved.

Letter of
removal.

The 31st section imparts the same force and effect *mutatis mutandis* to a letter of removal³⁴ in a statutory form granted by

²⁹ St. 2.9.45.

³⁰ Ross, Removing, 93; and *infra*, pp. 494, 504.

³¹ As to competency of sheriff before and after the A.S., see *Nisbet v. Aikman*, 1866, 4 M. 284, a case on a different point; *Bethune's Tenants v. Bethune*, 1881, M. 7307; *Cs. Rothes v. Campbell*, 1693, 4 B.S. 55.

³² 16 & 17 Vict. c. 80; the sections with relative schedules are printed in Appx. No. x.

³³ As to which see *supra*, p. 475.

³⁴ Refusal to grant this letter does not appear necessarily to entail on tenant liability for expenses of removing—*Keegan v. Robertson*, 1862, *Guthrie's* Dec. 298.

a tenant in possession either at entry or at any other time and holograph or tested by one witness. It is a sufficient warrant to a sheriff-officer to remove and eject the tenant or any one in his right on the lapse of the term or terms specified in the letter. If the letter is dated more than six weeks before the term of removal or the first in date notice must be given at least forty days before the same, and a certificate or acknowledgment endorsed as above; and the same provisos are added regarding *mora* and suspension.

These sections are general in their scope; and, though they contain references to 'the county within which such lands and 'heritages are situate' and to different terms of removal from lands and houses, there seems to be no sufficient reason for excluding leases of burgal subjects from their operation; alongside of and alternatively to the exclusively burgal processes for removing or ejection.³⁵ They apply also to removings of sub-tenants.³⁶ Scope thereof.

An important alteration in the law with regard to leases of subjects to which the Agricultural Holdings Act³⁷ applies³⁸ has been introduced by the 28th section of that statute. As the majority of such leases are probative and contain a definite ish, and this section refers to the enactments which have just been noticed, this seems the appropriate place to insert its terms. Agricultural Holdings Act.

28. Notwithstanding the expiration of the stipulated endurance of any lease, the tenancy shall not come to an end unless written notice has been given by either party to the other of his intention to bring the tenancy to an end— Notice of termination of tenancy.

(a) In the case of leases for three years and upwards, not less than one year, nor more than two years, before the termination of the lease:

(b) In the case of leases from year to year, or for any other period less than three years, not less than six months before the termination of the lease.³⁹

Failing such notice by either party the lease shall be held to be renewed by tacit relocation for another year, and thereafter from year to year.

Notice by the landlord to the tenant under this section shall be given in the form and manner prescribed by the Sheriff Courts (Scot-

³⁵ Hunter is *contra*, ii. 76.

p. 239.

³⁶ Logan v. Brown, 1871, 8 Sc.L.R. 556.

³⁹ Though the Act had not been in operation for that period—L. Macdonald v. Finlayson, 1884, 12 R. 228. 'The same question cannot now arise.

³⁷ 46 & 47 Vict. c. 62; printed in Appx. No. ii.

³⁸ As to which see sect. 35 and *supra*,

land) Act, 1853, and shall come in place of the notice required by the said Act.

Provided that nothing contained in this section shall affect the right of the landlord to remove a tenant who has been sequestrated under the Bankruptcy (Scotland) Act, 1856, or who by failure to pay rent or otherwise has incurred any irritancy of his lease, or other liability to be removed :

The provisions relative to notice herein contained shall not apply to any stipulation in a lease entitling the landlord to resume land for building, planting, feuing, or other purposes, or to subjects let for any period less than a year.

Some points seem to be clear; others obscure. It is clear that the section applies (1) to leases entered into either before or after the passing of the Act, (2) not to probative leases only but to all 'agreements for the letting of land' (sect. 42) in the sort of holding described elsewhere in the Act (sect. 35); and (3) to such leases only as are approaching or have outlived their natural expiration, not to such as come to a premature conclusion, as set forth in last chapter. The section is not so clear in other respects. (1) Leases entered into subsequently to the passing of the Act may, it would appear (since the section (36) which provides against contracting out of the statute only applies to the compensation sections), contain a valid provision ousting the statutory rule and providing for some other form or length of notice, while express provisions as to notice of termination in leases current at the date of the passing of the Act are superseded by the statutory rule, which can only be itself superseded by the subsequent agreement of parties. (2) The 'form and manner' of notice, or at least of instructing the fact that notice has been given, as set forth in the 30th and 31st sections of the Act of 1853⁴⁰ are applicable only to cases in which there is a written lease or a letter of removal; so that in cases where, under the present section, there is no writ on which the certificate may be endorsed, it will probably be held sufficient for the officer to return a certificate either by itself or appended to a copy of the notice. (3) The 'right of the landlord to remove a tenant who has been sequestrated' is not one which the landlord possesses at common law,⁴¹ though the wording of the proviso above may suggest the contrary; and (4) No form is given by the section for the tenant's notice of intention to remove. The form and mode of authentication of the letter of removal set out in Schedule K of the Act of 1853 may be recommended for imitation; though the Court

⁴⁰ *Supra*, p. 478.

⁴¹ *Supra*, p. 468.

would probably demand no great formality, provided the notice be in writing and duly delivered. Finally, the section seems to apply only to cases in which the parties are proceeding at arm's length; and there is nothing to prevent their changing their minds during the long periods of premonition, and agreeing either to be rid of each other or to enter on tacit relocation or a new lease.

II. SOLEMN REMOVINGS.

In most cases where valuable subjects are let, the contract is reduced to probative form, and the writ contains a stipulation fixing a definite ish. So that it has been thought convenient to begin this chapter with an explanation of the rules which regulate ordinary removings in the large majority of cases in which purely summary procedure is incompetent.⁴² Following the order of time and logic, it would have been better to start with the 'solemn' or 'formal' removings now to be described, had it not been that the old statute of 1555, which first restrained the caprice of landlords and was general in its scope, is now obsolete in practice, and that the alternative allowed by the Act of Sederunt of 1756, as amended by the Sheriff Courts Act of 1853 and by the Agricultural Holdings Act of 1883, is limited in its scope to certain classes of subjects. The Act of 1555 has never been repealed. The opinion may be hazarded that it still affords a competent remedy in all cases of removing whatsoever; and that it or the alternative procedure referred to furnishes the only competent remedy in certain cases. In regard to the old Act, it will be sufficient to refer to its terms,⁴³ and to the older authorities in the briefest possible way in so far as its distinctive method of attaining the great aim of all solemn removings—due notice to the tenant—by precept from the landlord is concerned. The modern equivalent in the form of action and its sequels will demand and receive more detailed treatment.

Available in all cases.

And, as simplified, to farming leases.

Act 1555, c. 39.

The Act 1555, c. 39, was passed in order to rid the country of the violence which was a usual accompaniment of the older removings (often of the most wholesale kind) on verbal warning only.⁴⁴

⁴² As to which, see *infra*, 498.

⁴³ Printed in Appx. No. vii.

⁴⁴ Balf. 472; Cr. 2.9.1; Ross on Removing, 20. The symbol was the breaking of a dish (*lanx*), Cr. 2.9.4; as to

which see the errors of Stair, 2.9.33; Mack. Obs. 69; and Ersk. 2.6.45. The *lanx* was used as a symbol in old Roman law for a different purpose. Gaius, iii. 192.

To what subjects it applies.

It provides for removings from 'lands, mills, fishings, and possessions whatsoever.' It is thus a competent remedy in regard to all sorts of subjects. In the earlier part of this chapter it has been shown that another procedure is provided, if an obligation to remove, express or implied, exists. Farther on it will be shown in what cases summary procedure is competent. In other cases the procedure of the Act or the alternative afterwards introduced is not only competent but imperative in the absence of consent of parties. This is true mainly of rural tenements, meaning thereby land, fishings,⁴⁵ shootings, and the like, whether in town or country, as distinguished from buildings in either locality.⁴⁶ Where land and houses are combined in the same holding, the question whether a solemn removing is requisite depends on the further question, which of the two is accessory to the other, as the farm-house to a farm;⁴⁷ or a moderate garden,⁴⁸ policy, or allotment,⁴⁹ to a villa, mansion-house, or cottage. They are regarded as indivisible, except in regard to the day of the removing.⁵⁰

To what leases.

Not to leases for a year or under.

Or of grass parks.

But to leases from liferenter, &c.

But even where by reason of the nature of the subjects let the tenant would otherwise be protected against summary removing, the operation of the statute and Act of Sederunt will probably be ousted by the circumstance that the lease is for a year only,⁵¹ and will certainly be excluded by the ordinary tenure of grass parks.⁵² By an extension of the principle of an old Act relating to ward holdings (1491, c. 26),⁵³ tenants holding from a liferenter, or for the life of their lessor,⁵⁴ or for the life of a third party,⁵⁵ are entitled to formal warning. Subtenants (and probably also assignees) of a liferent lessee have the same

⁴⁵ *Gordon v. Burnet*, 1783, M. 13859 (under A.S. 1756, but turning on Act, 1555); *Ersk.* 2.6.47; *More's Notes*, 257.

⁴⁶ *Infra*, p. 499.

⁴⁷ *Hay v. Kerse*, 1740, M. 13837; *L. M'Naughton v. Wilson*, 1765, M. 13857, 5 B.S. 568.

⁴⁸ *Chirnside v. Park*, 1843, 5 D. 864.

⁴⁹ *Brown v. Hill*, 1798, Hume 563.

⁵⁰ 49 & 50 Vict. c. 50, as to which, *infra*, p. 501.

⁵¹ *Dunlop & Co. v. Meiklem*, 1876, 4 R. 11; *Bell, Leases* (2nd ed.), p. 504, quoted *ibid.* p. 18. (The view in note to ii. 121 of the 3rd edition is *contra*.) There is no help to be obtained from *Forsyth v. Bruce*, 1827, 6 S. 101; *M'Nair v. L. Blantyre's Tutors*, 1833, 11 S. 935;

D. Argyll v. Russell, 1799, M. Appx. Removing, 2; *Brown v. Peacock*, 1822, 1 S. 359 (N.E. 337), which all went on specialties. The area of the practical interest of the question is circumscribed by the 28th section of the Agricultural Holdings Act of 1883, *supra*, p. 479.

⁵² *Macharg*, 1805, M. Appx. Removing, 4; *Hume in Brown v. Hill*, *supra*, 49; *Ersk.* 2.6.27, note.

⁵³ *Balf.* 458; *St.* 2.9.23, 28; *Bankt.* 2.9.38; *Ersk.* 2.6.49; *Mack. Obs.* 104.

⁵⁴ *Johnston's Trs.*, 1803, M. 15207, and *Udny v. Brown* there; 2 *Bell, Leases*, 111; *More's Notes*, 257; *Ersk.* 2.6.49, note; *Hermistoun v. Butler's Relict*, 1631, 1 B.S. 321.

⁵⁵ *Ross v. Ross*, 1805, Hume 573.

privilege,⁵⁶ though his heir and *a fortiori* his widow⁵⁷ have not;⁵⁸ Not to liferent leases.
since in the one case there was a title to possess, though defeasible; while in the other case no title to possess could *ex hypothesi* come into existence.⁵⁹

The obsolete provisions of the Act 1555, c. 39,⁶⁰ required that lawful warning should be made—(1) upon a precept⁶¹ from the landlord; (2) any time within the year forty days before Whitsunday; ⁶² (3) according to certain stringent rules for personal or equivalent execution of the writ; ⁶³ and (4) with certain publication within and on the parish church.⁶⁴ If the tenant did not remove at the term, the landlord might obtain from the Courts of the land letters or precepts calling the parties warned, and possessors to appear; in other words, might bring a summons of removing.

The only one of these requisites for a regular warning which requires further notice here is the second, which relates to the time of warning. It has been decided, contrary to the opinion of text-writers both before and after the decision was given,⁶⁵ that it was enough if the warning took place on the fortieth day (5th April) before Whitsunday, not counting the term-day, and that forty free days did not have to intervene between the term and the date of the warning.⁶⁶ The term from which in every case the forty days were counted back was Whitsunday—that either being itself the term (or the first term) of removing, or the Whitsunday preceding that term or first term;⁶⁷ and the requirement that the warning should be within the year of the removing was relaxed or ignored accordingly.⁶⁸

⁵⁶ Carmichael v. Bertram, 1711, M. 13833; and Obs. in Johnston's Trs., *supra*, ⁵⁴; Ms. Tweeddale v. Murray, 1846, 8 D. 411, rev. 6 B. Ap. 125.

⁵⁷ Rowallan v. Boyd's Relict, 1630, M. 13825, 1 B.S. 306, notwithstanding.

⁵⁸ *Infra*, p. 505.

⁵⁹ B. Pr. 1269 is too widely stated.

⁶⁰ See Cr. 2.9.5; St. 2.9.40, 4.26.6; Mack. 2.6.11, Obs. 155; Bankt. 2.9.50; Ersk. 2.6.45; 2 Bell, Leases, 62; B. Pr. 1267.

⁶¹ As to the form thereof, see Spottisw. 65; Ross, Remov. 61; cases in M. 3756, and Elch. Removing, 1 and 2.

⁶² *I.e.*, After 1690, c. 39, and 1693, c. 24—15th May. The aim was to give farmers time to look elsewhere before the ordinary term of entry.

⁶³ Cases in M. 2182, 3756, 13820,

13829-30, 13860-61; Elch. Removing, 1; Hume 571.

⁶⁴ Cases in M. 13826, 13836, 13849; 1 B.S. 227.

⁶⁵ Balf. 457; Cr. 2.9.2; Ersk. 2.6.46, who does not seem to have been aware of the decision.

⁶⁶ *Da. Buccleuch v. Davidson*, 1715, M. 13836, 13861; see More's Notes, 257. The decision runs counter to the view taken in the Act of 1853, *infra*, p. 484.

⁶⁷ Balf. 475; Cr. 2.9.5; St. 2.9.40, 4.26.7; Mack. 2.6.11, Obs. 155; Bankt. 2.9.56; Ersk. 2.6.46; More's Notes, 257; and see Kames' Eluc. 278, and Ross on Remov. 34; cases in M. 13837, 13855-60; Elchies, Removing, 3.5.6, 8.

⁶⁸ Cases in Elchies, Removing, 3 and 6; 5 B.S. 207, 568.

Defects of
the Act.

These rules of the old statute laboured under two disadvantages. (1) They unnecessarily postponed the inception of judicial proceedings till after the term for removal had come and gone, and involved delay in reacquiring possession as landlord, or in obtaining possession as incoming tenant; and (2) Whitsunday was the only date to be looked to in giving notice of removing. The former defect was amended by the Act of Sederunt of 1756; the other was only done away with in 1853.

Act of Sederunt, 1756, sect. 2, and Amendments.

A.S., 1756,
sect. 2.

The 2nd section of the A.S., 17th December 1756, runs thus:—

Where the tenant hath not obliged himself to remove without warning,⁶⁹ in such case it shall be lawful to the heritor or other setter of the tack in his option either to use the order prescribed by the Act of Parliament made in the year 1555, intituled ‘Act anent the Warning ‘of Tenants,’ and thereupon pursue a warning and ejection, or to bring his action of removing against the tenant before the Judge Ordinary; and such action being called before the Judge Ordinary at least forty days before the term of Whitsunday shall be held as equal to a warning execute in terms of the foresaid Act; and the Judge shall thereupon proceed to determine in the removing in the terms of that Act in the same manner as if a warning had been executed in terms of the foresaid Act of Parliament.

Sheriff Courts
Act, 1853,
sect. 29.

The term of Whitsunday was thus retained as the only date to be looked to in giving notice of removing,⁷⁰ and such remained the state of the law till the passing of the Sheriff Courts (Scotland) Act of 1853,⁷¹ whose 29th section provides that—

It shall be competent to raise a summons of removing at any time, provided there be an interval of at least forty days between the date of the execution of the summons and the term of removal, or, where there is a separate ish as regards land and houses or otherwise, between the date of the execution of the summons and the ish which is first in date.

Agricultural
Holdings Act,
sect. 28.

Then, in regard to subjects falling under the scope of the Agricultural Holdings Act there must be written notice by either party, in the case of leases for three years and upwards, dated not less than one year nor more than two years before the termination of the lease; in the case of leases for shorter periods,

⁶⁹ *Supra*, p. 474.

⁷⁰ See *Macnaughton v. Wilson*, 1765, M. 13857, 5 B.S. 568; *McNab v. Annexed Estates Comrs.*, 1770, 5 B.S. 568. *Fal-*

coners v. Smith, 1770, 5 B.S. 569; *Gordon v. Burnet*, 1783, M. 13859 (fishings).

⁷¹ 16 & 17 Vict. c. 80.

not less than six months before the termination.⁷² In the cases which fall under this provision without having the advantage of the shorthand remedy provided for bringing to an end leases with an express or implied obligation to remove, the only competent procedure for the landlord is to bring an action of removing in the mode now to be explained.

ACTION OF REMOVING.

1. *Petition and Defences.*

Whatever be the preliminaries, and whatever the length of notice—under the Act of 1555, the Act of Sederunt of 1756, the Sheriff Courts Act of 1853, or the Agricultural Holdings Act—a landlord can carry out a solemn or formal removing only by applying to the proper Court, in the form of an action (now of a petition) of removing. It has been already shown who are the proper parties in all processes for removing.⁷³ The progress of the action itself, when properly raised, will now be traced.

Under the Act 1555 the action could, and may conceivably still, be brought either before the Court of Session or the sheriff. Under the Act of Sederunt and the statutes which recognise it as law and amend it, the Sheriff Court is the only competent tribunal.⁷⁴ Under the new procedure, introduced in 1876,⁷⁵ the initial writ is a petition,⁷⁶ consisting of a short preamble, a prayer, an articulate condescendence, and a note of pleas in law. The prayer asks the Court to ordain the defender to flit and remove himself, his family, subtenants, cottars, and dependants, with their cattle, goods, and gear (or as the case may be) from the subjects let (giving their name or otherwise defining the holding) at a stated date, and then to leave them 'void and redd to the end that the pursuer or 'others in his name may then enter thereto and peaceably possess 'and enjoy the same; and that under the pain of ejection.'⁷⁷ Since 1853 (whatever may have been the case formerly),⁷⁸ neither the Act of Sederunt nor any of the statutes has to be specially libelled on.⁷⁹ The ordinary regulations of the Sheriff

⁷² 46 & 47 Vict. c. 62, sect. 28, printed and analysed, *supra*, p. 479, and see the Act in Appx. No. ii.

⁷³ *Supra*, p. 441.

⁷⁴ *Cameron v. M'Donald*, 104, M. 13875; B. Pr. 1268; Ersk. 2.6.48, note.

⁷⁵ 39 & 40 Vict. c. 70, sect. 6, and sched. (A).

⁷⁶ See the old rule in *Hoy*, 2nd June

1810, F.C. 677; *More's Notes*, 260; 2 Bell, Leases, 79; B. Pr. 1268; *Tait v. Gordon*, 1828, 6 S. 1055 (want of stocking.)

⁷⁷ *Lees*, Sheriff Court Styles, 296.

⁷⁸ *Carruthers v. V. Stormont*, 1764, M. 13868.

⁷⁹ *Granger v. Geils*, 1857, 19 D. 1010; *Lyon v. Irvine*, 1874, 1 R. 512.

Court Act regarding the *induciae*,⁸⁰ and mode of citation (sects. 8-12) decrees in absence (sects. 14, 15); and making up the record (sects. 16-24)⁸¹ are to be followed. The calling in Court must take place forty free days before the term (or first term) of removal.⁸²

Defences.

Many sorts of defences have been figured in the books, such as objection to the pursuer's title;⁸³ a subsisting lease or a current obligation not to eject;⁸⁴ a conditional tenure where the condition of removing has not arrived;⁸⁵ a possessory judgment;⁸⁶ or a preferable heritable right in the defender's author;⁸⁷ but such an enumeration is valueless, since it is impossible to set limits to the diversity of circumstances or the ingenuity of lawyers. It is proper, however, to notice here two pleas in defence which have not found a place elsewhere.

Prescription.

The old Act (1579, c. 82) which introduces 'prescription in 'causes of removing,'⁸⁸ does not affect modern practice, for it only provides that 'all actions of removing be pursued within three 'years after the warning, with certification an they failzie, the 'warners shall never be heard thereafter to pursue the same 'upon that warning'—a provision which only applies to the procedure under Act 1555. The later enactments (1669, c. 9 : as explained or corrected by 1685, c. 14) do, however, apply to actions of removing apart from the old form of warning. They provide that all actions proceeding on warnings, spuilzies, and ejections shall prescribe in five years if they be not wakened within that time, minorities being excepted.⁸⁹ The *terminus à quo* is, notwithstanding the clear wording of the Acts, the term of removal.⁹⁰ In modern practice, much may have happened in the interval to disturb the operation of this prescription.

Jus quæsitum tertio.

Two cases have occurred in which a tenant has been found entitled (it has been said)⁹¹ to defend himself on stipulations made in his favour in deeds executed between other parties—

⁸⁰ As to edictal citation, see 1 Mackay, Practice, 398.

⁸¹ Amendments are now allowed more freely than of old; see E. March v. Dowie, 1754, M. 13843; Campbell v. Johnston, 1793, M. 13849.

⁸² *Supra*, p. 484.

⁸³ *Supra*, p. 441.

⁸⁴ Balf. 459 *seqq.*; Cr. 2.9.33 *seqq.*; St. 2.9.43, 4.26.10; Ersk. 2.6.54. Cases in M. 12302, 13784, 13797; acceptance of herezeld, M. 6419 *seqq.*, 7195, 11609.

⁸⁵ Hardie v. Wilson, 1673, 1 B.S. 690; Thomson v. Terney, 1791, Hume 780 (pur-

chaser bound); M'Crae v. M'Kenzie's Trs., 1831, 9 S. 392 (meaning of an agreement.

⁸⁶ St. *supra*, ⁸⁴; Bankt. 2.9.66.

⁸⁷ Cr. 2.9.36; St. *supra*, ⁸⁴; Bankt. 2.9.65; Annand v. Tenants, 1628, M. 13808.

⁸⁸ St. 2.9.43, 2.12.30, 4.26.10; Mack. Obs. 195, 249; Bankt. 2.12.34; Ersk. 3.7.18; Ross on Remov. 114; Napier, Prescription, 712.

⁸⁹ St. 2.12.30; Bankt. 2.12.27, 34.

⁹⁰ Ly. Borthwick v. Scot, 1629, M. 6422, 11076; Ersk. 3.7.18, 36.

⁹¹ 2 Hunter 68.

under the doctrine of *jus quæsitum tertio*. In the earlier case, which is obscurely noted,⁹² the point does not seem to have really arisen, the real question being as to the title of a lessor to let excambied lands beyond the period during which the excambion existed. The tenant had his own 'tacks and assedations' to rely on. In the later case, however, the rule of *jus quæsitum* was raised purely. In a long lease the landlord took the tenant bound to allow a cottar and his wife 'to continue into 'possession of the sit-house and yard presently occupied by 'them,' at a stated rent during life or at least during the currency of the long lease; and it was declared that it should not be in the power of the tenant to remove them or raise their rents during that period. Five years later landlord and tenant combined in raising an action of removing against the cottars. The Court gave effect to the plea of *jus quæsitum*, without demanding any other proof than the lease that the landlord had contracted with or bound himself to the crofters in the terms recorded in the lease.⁹³ It is difficult to see any justification in law for adopting this view, and, as has been pointed out, the only authority cited⁹⁴ is not in point. It would have been different if the landlord had not concurred in ousting them; but then the proper remedy would have been for them to obtain the use of his name in defending the suit or suspending the decree.

2. Violent Profits.

The old Act of 1555, c. 39, points out, not obscurely though in archaic form, the course of an action of removing both then and now. There is provision for decree in absence if the defenders 'compeir not;' for absolvitor or dismissal, 'gif they compeir and 'instantly schawis sufficient title to bruik [possess] the landes;' and for the third possible case of compearance, without a title to exclude but mere 'allegeance' and 'offer to improve the 'indorsation. In that case he sall not be heard in judgment, 'bot if he find sufficient caution to the warner then instantly 'that gif his allegeance, being foundin relevant, be not sufficiently 'verified and prooven by him that the profitis, damage, and 'interest whilkis the said warner or ony uthers having interest 'hes susteined or sall happen to susteine by the delay of the 'foresaide allegeance be refounded to him.' These words are the warrant for ordering what is called 'caution for violent profits,'—the first important peculiarity of a process of removing. The same specialty is thus briefly prescribed in a modern Act of

Introduction
of caution for
violent profits.

⁹² Wood v. Moncur, 1591, M. 7719;
1 B.S. 126.

⁹³ Craigie v. Reid, 1807, Hume 830.

⁹⁴ Wood v. Moncur, *supra*, ⁹².

Sederunt:⁹⁵—‘In action of removing and in summary applications for ejection,⁹⁶ the defender shall come prepared with a cautioner for violent profits at giving in his defences or answers, unless he instantly verify a defence excluding the action.’

Violent profits.

Violent profits (so called because they are due in respect of violent possession) are penal damages, exigible as a preventive against unwarrantable taking or keeping of possession, ‘for whatever is done without proper warrant or authority is by the law accounted violence.’⁹⁷ The title to demand them is the same as the title to pursue a removing.⁹⁸ Thus an assignee to a warning and action of removing which has proceeded to liti-contestation is not affected, so far as his claim for violent profits is concerned, by any plea emerging thereafter and sufficient to meet the conclusion for a removing.⁹⁹ An assignation to a lease carries right to a claim for violent profits made in an action of removing (against the lessor, who refuses to cede possession) which was depending at the date of his assignation, and to a bond of caution for them lodged in the action.¹⁰⁰ The liability extends to all possessors without sufficient title; and, *à fortiori*, to possessors—such as subtenants holding from tenants having no right to sublet—whose title is *ab initio* void.¹⁰¹ Liability is not escaped by raising an action to enforce an alleged bargain for a new lease.¹⁰²

Title to exclude.

Difficulty may arise in regard to the question whether there has been ‘instant verification’ of a title to exclude. Thus, during the currency of a liferent lease, the landlord by missive letter bound himself to the tenant to renew it in favour of the tenant’s son at the first term of Whitsunday after its expiration. The landlord died, and then the tenant. In counter actions of removing and implement, raised before the Whitsunday, between the landlord’s heir and the tenant’s son, caution for violent profits was demanded, and by the Lord Ordinary ordered to be found; but the Inner House reversed on the broad ground that the obligation was not the inception of a new lease, but substantially a prorogation of the old, leaving, therefore, no interval of possession without title.¹⁰³ But a plea that there had been no warning and that tacit relocation had therefore set in, is not

⁹⁵ A.S., 10th July 1839, sect. 34.

⁹⁶ Cromar v. D. Gordon, 1830, 8 S. 353.

⁹⁷ Ersk. 2.6.54.

⁹⁸ *Supra*, p. 441.

⁹⁹ Ross v. Ly. Fowlis, 1595, M. 16459.

¹⁰⁰ Barbour v. Bell, 1831, 9 S. 334.

¹⁰¹ Cromar v. D. Gordon, *supra*, ⁹⁶.

¹⁰² Fleming v. Morrison, 4th June 1835, F.C. 629, 13 S. 859.

¹⁰³ Wilson v. Henderson, 1823, 2 S. 380 (new ed.), which corrects 2 S. 428 (old ed.).

a defence capable of being instantly verified.¹⁰⁴ If the landlord has himself something to prove in order to establish a title to sue, both parties are *in pari casu*, and he cannot demand caution.¹⁰⁵

The rule requiring caution for violent profits holds in all cases where there never was a right to possess or where a right once in existence has reached its natural termination; and it is of no consequence whether the remedy asked is a solemn removing or a summary ejection.¹⁰⁶ Where there never was a right the possessor can show no title to oppose the pursuer's infetment; in the other case he may produce his lease but it bears on the face of it the lapse of the right. It is different in some cases where the removing is extraordinary in the sense that it cuts short a current right; for there the lease instructs a subsisting contract and the landlord must prove something extrinsic thereof and of his infetment in order to succeed.¹⁰⁷ Therefore, for example, an action founded on desertion by a tenant in the sense of the 5th section of the Act of Sederunt of 1756,¹⁰⁸ is not (at all events in its first stage) an action of removing to which the rule as to violent profits applies: it is, on the contrary, an action of irritancy and the fact of desertion has to be proved. So that it is of importance to discriminate between this caution for violent profits and the caution which is provided for in the A.S. of 1756.¹⁰⁹ But, just as in the case of alleged desertion, an admission of abandonment would entail liability to find caution,¹¹⁰ and just as where the right to remove a tenant before the ish is in the absolute discretion of the landlord and he exercises that discretion violent profits are due by a tenant who refuses to quit after intimation thereof;¹¹¹ so in the usual cases of removing founded on irritancy, the absence of receipts (where there is alleged arrear of rent) or the production of an extract of the deliverance awarding sequestration or cessio against the tenant (where the cause of irritancy is bankruptcy) would let in the demand. Such documents are

No title
produced.

Desertion.

Irritancy.

¹⁰⁴ *Johnstone v. Maxwell's Trs.*, 1845, 7 D. 1066. See *Robb v. Menzies*, 1859, 21 D. 277.

¹⁰⁵ *St. Clare v. Grant*, 1687, M. 13893; *Oliver v. Weir's Trs.*, 1870, 8 M. 786, *per* L. Cowan.

¹⁰⁶ *Robb v. Menzies*, *supra*, ¹⁰⁴.

¹⁰⁷ *Oliver v. Weir's Trs.*, *supra*, ¹⁰⁵, see esp. *per* L. Neaves; see *Douglas v. Idington*, 1628, M. 13892 (back-tack and wadset). In *Rae v. Henderson*, 1837, 15 S. 653, no decision on the point was reached; see *op. of* L.O. Corehouse.

¹⁰⁸ *Supra*, pp. 460, 463.

¹⁰⁹ The distinction was ignored in *Cossar v. Home*, 1847, 9 D. 617; given effect to in *Mackenzie v. Mackenzie*, 1848, 10 D. 1009, and was clearly in view in *Oliver v. Weir's Trs.*, *supra*, ¹⁰⁵. See Mr. Hunter's view *contra* in 12 *Journ. of Jurisp.* 363, in a case decided before *Oliver*.

¹¹⁰ *Cossar v. Home*, ¹⁰⁹; *Oliver v. Weir's Trs.* ¹⁰⁵.

¹¹¹ *Houldsworth v. Brand's Trs.*, 1876, 3 R. 304.

instantly produceable and prove themselves, and their existence or non-existence (as the case may be) is really part of the landlord's title to re-enter.

Bona fides.

It is a good answer to a claim for violent profits that the tenant possessed in good faith; so that liability only supervenes at and from the time at which *bona fides* ceases and *conscientia rei alienæ* begins. The determination of this point of time depends wholly on the circumstances of each case,¹¹² subject to certain rules which have been thus laid down by L.J.-C. Moncreiff:¹¹³ 'First, when the possession has commenced in good faith, it lies with the true owner to show when it ceased to be so before the right to demand violent profits can prevail. Secondly, when possession has been continued during a litigation regarding the title of the possessor, it is sufficient to support the possessor's plea of *bona fides* that he had *probabilis causa litigandi*. And third, the principle is equally applicable whether the possession be challenged in respect of want of title in the possessor's author or in respect of the nature and conditions of his own right.' It may be added that the passage from *bona* to *mala fides* must be taken as having occurred at some stage of a judicial process, not through private intimation. It may be useful, however, to refer shortly to the cases which have arisen in the law of landlord and tenant, and which illustrate the doctrine of *bonâ fide* perception and consumption.

Cases.

Sublessees, not recognised by the landlord, refused to remove, after the principal lessee had given up his lease and agreed to quit, their reason being that, though reasonable notice had been given to them, they had not received regular warning. Violent profits were held to be due for the period during which they had opposed decree of ejection.¹¹⁴ Where warrant of ejection following on decree of removing was obtained but not executed, the tenant who kept possession in opposition thereto for a year was found liable in violent profits for the period subsequent to the date of the decree.¹¹⁵ In cases which took their rise in the Court of Session, the turning point has been the date of a Lord Ordinary's interlocutor subsequently adhered to;¹¹⁶ or the date of a judg-

¹¹² The cases are collected in Rankine, *Landownership*, p. 72; and see *Barbour v. Bell*,¹⁰⁰.

¹¹³ In *Houldsworth v. Brand's Trs.*, 1876, 3 R. 304, 310.

¹¹⁴ *Ramage v. Briggs*, 1831, 9 S. 281. The cases noted in 2 Hunter 494-5 of King's Adv. v. Some Excommunicants,

1629, M. 1742; *M'Tavish v. M'Lauchlan*, 1748, M. 1736; *Leslie-Grant v. Dundas*, 1765, M. 1760, were not cases of violent profits.

¹¹⁵ *Watt v. Bell*, 1822, 1 S. 556 (N.E. 509).

¹¹⁶ *Houldsworth v. Brand's Trs.*, *supra*,
¹¹³.

ment of the Court subsequently affirmed by the House of Lords,¹¹⁷ or from the first term thereafter, even (in special circumstances) though there had been difference of opinion in the Court of Session.¹¹⁸ Or it has been the date of the presentation of an appeal to the House of Lords, the success of which was assured by the result of earlier cases *in pari materia*.¹¹⁹ Or it has been the date of a judgment of reversal by the House of Lords.¹²⁰ And if prior to the date so determined the lease comes to a termination, nothing is due in name of violent profits.¹²¹ Where a tenant was in possession, but a jury had found that the lease had been obtained by fraud, and certain questions of accounting remained behind for disposal, the finding of caution for violent profits was made a condition of leave to appeal to the House of Lords.¹²²

The date at which wrongful possession comes to an end is that at which the subjects are restored, 'void and redd' of the tenant, his family, dependants, and subtenants,¹²³ and also of new occupants collusively intruding before or within a short period after the tenant ceased to possess.¹²⁴ End of *mala fide* possession.

The bond of caution¹²⁵ proceeds on the narrative of an action of removing having been raised and of an order on the principal debtor to find sufficient caution for violent profits and lodge the bond in process, and binds the defender as principal debtor and another party as cautioner, surety, and full debtor with and for him and their heirs, executors, and representatives all jointly and severally to pay to the pursuer whatever sums shall be decreed to be paid by the defender in name of violent profits in case it shall be found in the course of the said action that he has not been well-founded in his defences. Bond of caution.

The amount which in that event may become exigible as violent profits, is, by an old custom, fixed at double the amount Measure of violent profits.

¹¹⁷ Henderson, 14th Dec. 1815, F.C. 53.

¹¹⁸ D. Gordon v. Innes, 1828, 6 S. 996, aff. 4 W. and S. 305. (The lease was granted to one who took advantage of the distresses of the lessor to dilapidate the estate; and the view was expressed that *mala fides* might have been thrown still farther back.)

¹¹⁹ Stirling v. Dun, 1831, 9 S. 276.

¹²⁰ Turner v. Turner, 3rd March 1820, F.C. 118, rev. 1 Dow 423; Elliot v. Pott, 1822, 1 S. 445 (N.E. 413), aff. 2 Sh. Ap. 181; D. Buccleuch v. Hyslop (Queensberry Leases cases), 1822, 2 S. 6 (N.E.

5), aff. 2 S. Ap. 43; E. Wemyss v. D. Queensberry's Exr., 1823, 2 S. 107 (N.E. 101), aff. 2 S. Ap. 70; Carnegie v. Scott, 1827, 6 S. 206, aff. 4 W. and S. 431.

¹²¹ Brisbane's Trs. v. Lead, 1828, 7 S. 65.

¹²² Gardner v. Beresford's Trs., 1877, 4 R. 1091.

¹²³ E. Argyle v. McNaughton, 1674, M. 13889.

¹²⁴ Greenlaw v. Adamson, 1624, M. 13888; Budge v. Sinclair, 1713, M. 13890; St. 2.9.43, 4.26.10; Ersk. 2.6.54.

¹²⁵ 2 Jur. Styles (5th ed.), 397.

of the rent, where the subjects are houses within burghs-royal, burghs of regality, or considerable burghs of barony;¹²⁶ but no rule is indicated in the books for estimating the amount of rent and the deductions, if any, allowable. In the case of all other subjects, though Lord Stair has attempted to lay down special rules for estimating the amount of liability,¹²⁷ it is perhaps safer to follow his general indication and confine violent profits to 'the greatest profits that the pursuer can prove he would have made.'¹²⁸ To these must be added reparation for 'all damages which the subject may receive at the hands of the defender.'¹²⁹ Nothing is allowed for meliorations or the interest of money spent thereon during the subsistence of *mala fides*.¹³⁰ If there be a sublease, the subrent is not conclusive of the value in a question between the landlord and the principal tenant.¹³¹

Violent profits
and damages.

There may thus be a considerable discrepancy between the ordinary rent or ordinary damages on the one hand and violent profits on the other; and the excess may be of importance, though claim for it prescribes in three years.¹³² In a recent case, the scope of these two remedies was elaborately canvassed. A colliery lease entitled the landlord to resume on being dissatisfied with the working of the coal by the lessee's representatives after his death. The landlord intimated dissatisfaction, but the representatives refused to quit till after litigation on the purport and exercise of the power. The landlord claimed violent profits for the period of the delay so caused, or alternatively damages. The latter alternative was chosen by the Court on the ground that the representatives had not been mere intruders but had been guilty of breach of a purely mercantile contract, a mining lease being, in this relation at least, distinguished from a lease of subjects yielding periodical produce.¹³³ The measure of damages was held to be the profit which resulted or might fairly be held to have resulted from the tenant's operations during the period of wrongful possession along with the loss of an increase on the lordship which would have been obtained under a new

¹²⁶ Hope, Min. Prac. 13.33; St. 1.9.27, 2.9.44, 4.29.3; Mack. 2.6.11; Bankt. 1.10.133, 147; Ersk. 2.6.54; Weddell v. Buchan, 1611, M. 16460; 2 Bell, Leases, 83.

¹²⁷ St. 1.9.27.

¹²⁸ St. 2.9.44.

¹²⁹ *Per* L.P. Inglis in Gardner v. Beresford's Trs., 1877, 4 R. 1091, 1092; Morton & Co. v. Colquhoun, 1783, M. 13893.

¹³⁰ D. Gordon v. Innes, 1828, 6 S. 996, aff. 4 W. and S. 305; D. Gordon's Trs.

v. Innes, 1832, 10 S. 616.

¹³¹ D. Buccleuch v. Grierson, 1827, 5 S. 676 (N.E. 631). As to the effect of a remit to a man of skill, see D. Buccleuch v. M'Murdo, 1827, 5 S. 677 (N.E. 632).

¹³² 1579, c. 81, as construed in St., *supra*,¹²⁶; Mack. Obs. 195; Ersk. 3.7.16; Cases in M. 11067-74 and 1 B.S. 36.

¹³³ Houldsworth v. Brand's Trs., 1876, 3 R. 304, esp. op. of L.J.-C. Moncreiff, p. 312.

lease, subject to deduction for tear and wear and interest on cost of machinery estimated generally.¹³⁴ And the commencement of the wrongful possession was held to be, neither the date of intimation of the landlord's intention to resume, nor any point in the original action raised to enforce this intention, but after the lapse of a reasonable time (about three months and a-half) subsequent to that intimation, allowed for arranging for the ceding of possession, including the closing of colliery engagements, disposal of surplus stocks of coal, dismissal of employees, and valuation of the plant which was to be taken over.¹³⁵

Action for recovery of violent profits may be raised, as an alternative to proceeding on the bond of caution, or where no caution has been or could have been obtained.¹³⁶ Action for violent profits.

3. Decree of Removing.

Where decree of removing is granted in the Court of Session it must be either in a proceeding under the old Act of 1555, c. 39—an obsolete remedy of which nothing further need be said—or in cases where a conclusion for removing follows, is ancillary to, and carries into practical operation, conclusions for declarator or reduction. With the charge on such a decree for removing, the function of the Supreme Court comes to an end. It leaves the ejection to be carried out by the Judge Ordinary, on a petition, as in the other cases now to be noticed. Decree of removing.
In the Court of Session.

In the Sheriff Court—which in most cases is the only competent tribunal—decrees of removing (other than those obtained under 1 & 2 Vict. c. 119, sects. 8-13)¹³⁷ may be extracted forty-eight hours after the interlocutor is signed. The extract¹³⁸ (shortly stated) decerns and ordains the defender to flit and remove himself, his family, &c., from the subjects libelled at a given term, 'and then to leave the same void and redd to the 'end that the pursuer or others in his name may then enter 'thereto, and peaceably possess and enjoy the same;' ordains officers to charge the defender accordingly, 'and that at the said 'term of if the charge to remove be given forty-eight 'hours before that term,¹³⁹ or within forty-eight after the charge, 'in case the same is not given forty-eight hours before that 'term, under the pain of ejection; wherein if the defender fail,' In the Sheriff Court.

¹³⁴ 1877, 4 R. 369—a jury question—(not for depreciation in its market value).

¹³⁵ Ibid.

¹³⁶ Last case; and Queensberry and other cases, *supra*, p. 491.

¹³⁷ As to which, *infra*, p. 503.

¹³⁸ Short form prescribed in A.S., 27th

Jany. 1830 Sched. (C), for 'Decreet of Removal;' Sellar, Forms, 384, 398.

¹³⁹ It may be given long before, to come into effect at, the term—Riddel v. Zinzan, 1671, M. 13828; Ly. Chatto v. Haliburton, 1681, M. 8130.

that the said officers eject him, his family, and others foresaid, and keep them furth thereof, and enter the pursuer and maintain him in peaceable possession; and to cause inventory the goods and gear so to be ejected; and to open lockfast doors if need be.

Ejection.

There is thus an order on the defender to remove; and failing his doing so on being charged,¹⁴⁰ there is an order on the officers of Court to eject him and his. Where, as in such ancillary removings as have just been referred to, an order of the former sort already exists; and where, as will be shown hereafter,¹⁴¹ it is not required, the form of extract warrant of ejection¹⁴² *de plano* grants warrant to officers of Court summarily to eject the defender, &c., from the premises, and to make the same void and redd as before. In both of these cases, if expenses are decerned for, decree for expenses and warrant to arrest and poind fall to be added.

Not executed
by night.

‘It is clear that the occupant of a dwelling-house cannot lawfully be ejected from it during the night-time. Humanity, as well as law, forbids it.’ But the limits of day and night in each case will depend on the whole circumstances. Sunrise and sunset are not accepted as such without inquiry, and the question is one for a jury.¹⁴³ It is plainly expedient (though, perhaps, not on the ground of humanity) that the same rule should obtain in all ejections whatever, as in other proceedings in execution.

Title to eject.

The rules regulating the title to sue have been already detailed. If the landlord die after obtaining decree of removing, it was formerly the law that his heir could not, while possessing on mere apparency, follow up the decree and obtain ejection.¹⁴⁴ The vesting by mere survivance, which has been introduced by the Conveyancing Act of 1874,¹⁴⁵ would probably be held to transfer a title to sue in such a case. If it be the tenant who dies after a decree of removing has been obtained against him, his heir may be ejected without any transference.¹⁴⁶ Where decree of removing against a subtenant had been obtained by the principal tenant and the landlord, and the latter died, the

Persons
ejected.

¹⁴⁰ See the older practice in *Ly. Stainhill v. Burd*, 1675, M. 13894; *Pringle v. E. Hume*, 1739, *ibid.*, and *Elch. Remov.* 4.

¹⁴¹ *Infra*, p. 504.

¹⁴² A.S., and Sellar, *supra*, ¹³⁸.

¹⁴³ *Macgregor v. Vt. Strathallan*, 1864, 2 M. 1339 (finished after sunset). See

Gordon v. Hope, 1703, M. 3739; 2 *Fountainhall*, 189.

¹⁴⁴ *Mackenzie v. Gillanders*, 1853, 16 D. 153.

¹⁴⁵ 37 & 38 Vict. c. 94, sect. 9.

¹⁴⁶ *E. Kintore v. Watt*, 9th Dec. 1809, F.C. 442. See 2 Bell, Leases, 124, note.

principal tenant was held entitled to enforce the decree without the concurrence of the deceased's heir.¹⁴⁷

Writ or oath seems to be the only competent mode of proof that a decree of removing has been passed from by the landlord; but probably (on the analogy of other departments of the law) an informal writ may be set up by *rei interventus*. Thus, oath was required where the tenant alleged verbal agreement and (as was admitted) that he had laboured, manured, and sowed the land just as if he were to sit on for another year; and the landlord alleged that this was done on his behoof and on promise by him of recompense.¹⁴⁸ Receipt by a landlord of all arrears of rent due under a lease, and also of an additional term's rent, may instruct that a decree of removing has been passed from to the extent of that term, but no further.¹⁴⁹

4. Review by Suspension.

The only competent mode of obtaining a review of a decree of removing or ejection, or of putting a stop to the execution of such a decree by charge or threatened ejection, is suspension in the Bill Chamber and Court of Session.¹⁵⁰ Appeal is incompetent, since, within the usual period allowed for appealing, extract may have gone out, and a charge taken place.¹⁵¹ It has all along been recognised that actions of removing demand despatch;¹⁵² and the necessity of finding caution in a suspension puts the tenant in a very different position from that which he would occupy if appeal were competent. If actions of removing and of interdict have been combined, appeal (formerly advocacy) is competent in regard to the conclusions for interdict alone;¹⁵³ and if a suspension of the removing be raised alongside of the appeal, the Court is entitled to consider it on its merits, and is not bound to pass the bill *ob contingentiam* of the appeal.¹⁵⁴ It would be going beyond the plan of this treatise to set forth the procedure in suspensions.¹⁵⁵ It will be enough to show (1) how suspensions of removings have been specially provided for by enactment, and

Right to eject
passed from.

Review.

¹⁴⁷ *Fraser v. Fraser*, 1833, 11 S. 565 (and question moved whether landlord's concurrence was originally necessary).

¹⁴⁸ *Hunter v. Dun*, 1809, Hume 584.

¹⁴⁹ *Grierson*, 17th Nov. 1812, F.C. 3.

¹⁵⁰ 6 Geo. IV. c. 120, sect. 44; *Gibson v. Scott*, 1826, 4 S. 404 (N.E. 407); *Roy v. E. Wemyss*, 1840, 2 D. 1345; *Fletcher v. Davidson*, 1874, 2 R. 71; *Ross v. Brims*, 1878, 15 Sc.L.R. 438.

¹⁵¹ *Wilson*, Practice, 560, 582.

¹⁵² 1555, c. 39; A.S., 14th Dec. 1756;

A.S., 10th July 1839, sect. 147; but the new process under the Sheriff Court Act 1876 (39 & 40 Vict. c. 70) in effect sweeps away the distinction (in the Ordinary Court) between ordinary and summary process.

¹⁵³ *McNair v. L. Blantyre's Tutors*, 1833, 11 S. 651.

¹⁵⁴ *Id. v. Eosd.*, 11 S. 935.

¹⁵⁵ See 2 Mackay, Practice, 482, 491. Parker, Suspensions, &c., *passim*.

(2) how the rules of procedure have been illustrated by cases relating to removing and ejection.

Form of suspensions.

Regulations relating to the form of suspensions of removings were promised in the Judicature Act of 1825;¹⁵⁶ but the promise was not fulfilled. The modern rules are contained in the proviso of the 4th section and in the 6th section of the Act 1 & 2 Vict. c. 86 (1838), which require that there shall be annexed to the Note an articulate statement of the facts on which the suspension is founded and a note of pleas in law. Formerly such suspensions could only be heard by the whole Court, or in vacation by three judges;¹⁵⁷ but now they proceed before the Lord Ordinary on the Bills without the concurrence of any other judges.¹⁵⁸ Suspension of a decree of removing is competent immediately on its being issued; either before or after extract;¹⁵⁹ before or after the reclaiming days in the inferior Court;¹⁶⁰ but not after the decree has been carried into execution by actual ejection,¹⁶¹ or after the tenant has ceded possession.¹⁶² After dispossession the appropriate remedy is reduction of the proceedings complained of.¹⁶³ Execution of a decree of removing will not be allowed to be stopped by a sist in an incompetent appeal,¹⁶⁴ nor by a claim of damages (as for non-repair of premises), unless in certain cases where the removing is extraordinary and grounded on alleged arrear of rent. In such cases the rules explained on earlier pages come into operation.¹⁶⁵

Caution—juratory.

In the matter of the caution to be offered and exacted,¹⁶⁶ the question which has been chiefly debated is in what circumstances the note shall be passed¹⁶⁷ on juratory caution only,¹⁶⁸ that is, caution which though not sufficient is sworn to be the best the suspender can find. It is a privilege available to him only if he

¹⁵⁶ 6 Geo. IV. c. 120, sect. 44.

¹⁵⁷ A.S., 14th Dec. 1756, sect. 6.

¹⁵⁸ 6 Geo. IV. c. 120, sect. 46.

¹⁵⁹ *Graham v. Gordon*, 1843, 5 D. 1207.

¹⁶⁰ *Ross v. Webster*, 1833, 12 S. 200;
Greig v. Boyd, 1827, 6 S. 250.

¹⁶¹ *M'Intosh v. Robertson*, 1830, 9 S. 75.

¹⁶² *M'Dougall v. Galt*, 1863, 1 M. 1012.

¹⁶³ The old rule refusing suspension and prescribing reduction, where the landlord required to resort to parole obtains no longer; see *Johnston v. Tenants*, 1628, M. 15151.

¹⁶⁴ *Wight v. Sutherland*, 1823, 2 S. 462 (N.E. 414). *Cromar v. D. Gordon*,

1830, 8 S. 353, is special, the subtenant's title being derived *a non habente potestatem*.

¹⁶⁵ *Supra*, pp. 201, 220, 294, 462; see *Graham v. Gordon*, *supra*,¹⁵⁹; *Mackintosh v. Watt*, 1821, 1 S. 194 (N.E. 183); *Shanks v. Grant*, 1829, 7 S. 573; *Scott v. Christie*, 1850, 18 D. 859.

¹⁶⁶ If neither caution nor consignment is ordered, the silence means that none is to be exacted—*Graham v. Gordon*, *supra*,¹⁵⁹.

¹⁶⁷ A.S., 14th Dec. 1756, sect. 6; 1 & 2 Vict. c. 86, sects. 4, 6; A.S., 24th Dec. 1839, sect. 4.

¹⁶⁸ The procedure is set forth in 2 Mackay, Practice, 184.

has a *probabilis causa litigandi*. The circumstances which have induced the Court to pass the bill on juratory caution are—the fact that the resting-owing of one year's rent (that being the reason of the removing under A.S., 14th December 1756, sect. 5), was a matter *sub judice* in another depending process;¹⁶⁹ that, in a case of alleged irritancy on account of two years' arrear of rent, there were counter claims in another process in respect of non-repair of premises, and abatement in respect of drainage expenditure and of land compulsorily taken by a railway company;¹⁷⁰ that there had been no opportunity of appeal (on a question of the admissibility of an essential witness) from the sheriff-substitute to the sheriff, and that the farm had come to no harm, but on the contrary was alleged to have been greatly ameliorated by the tenants, on the faith of missives granted by the landlord's factor;¹⁷¹ and that the landlord's answer to a circumstantial statement in the tenant's pleadings regarding the granting of an additional lease was so curt and unsatisfactory as to lead to the impression that the denial was merely formal.¹⁷² It is always a make-weight in determining the Court to allow juratory caution, that the inventory shows the security not to be illusory.¹⁷³

However much the sheriff may vary in his interlocutor the terms of the decree of removing craved in the petition, the Court in a suspension has no other function than either to refuse or sustain it¹⁷⁴—a limitation of discretion which does not exist in regard to appeals and is often productive of injustice.¹⁷⁵

Decree cannot be varied.

5. *Wrongous Ejection*.

If ejection takes place without order of law, a claim of damages for wrongful ejection emerges.¹⁷⁶ Thus, where a landlord wishing to eject his tenant illegally seized his effects, reparation for the spuilzie (including the profits the tenant might have got thereafter from the land) was awarded; but a claim in a new action of damages for ejection was refused on the ground that the landlord had well paid for the spuilzie.¹⁷⁷ If a tenant

Damages for wrongful ejection.

¹⁶⁹ *Marshall v. Gartshore*, 1850, 12 D. 946.

¹⁷⁰ *Scott v. Christie*, 1856, 18 D. 859.

¹⁷¹ *Andrew v. Colquhoun*, 1852, 15 D. 164.

¹⁷² *Logan v. Weir*, 1870, 8 M. 1009 ('irrelevant and denied'). *M'Allister v. Sprot*, 1825, 4 S. 353 (N.E. 357), was no more than a compromise on the Bench; see *Logan v. Brown*, 1871, 8 Sc.L.R. 556.

¹⁷³ *Marshall v. Gartshore*, *supra*,¹⁶⁹; *Logan v. Weir*, *supra*,¹⁷².

¹⁷⁴ *Lyon v. Irvine*, 1874, 1 R. 512.

¹⁷⁵ As to interim execution pending appeal to House of Lords, see *Mackay* i. 612, ii. 428; and esp. *Gray v. Low*, 1859, 21 D. 723.

¹⁷⁶ See case which failed—*Thomson v. Handyside*, 1833, 12 S. 557.

¹⁷⁷ *Russel v. Clark*, 1749, M. 15265. *Hunter* (ii. 508) doubts the decision, but, looking to the measure of damages in the earlier case, it seems right.

is summarily ejected without order of law and his furniture thrown into the public road, he is entitled to reparation for the injury done to the furniture, expenses incurred through the ejection, and loss of trade (if any), besides *solatium* for wounded feelings.¹⁷⁸ It has been shown that ejection in the night-time is illegal, and will therefore give rise to a claim for damages.¹⁷⁹ Even applying for and obtaining an illegal warrant of ejection is a ground of damages, though it have not been executed.¹⁸⁰ But right of action was refused to a tenant ousted from dwelling in a barn and barnyard, which he was entitled to occupy after the (in the cited case premature) termination of his lease only for the purpose of stacking and thrashing the waygoing crop.¹⁸¹ Nor does any claim for damages arise from the goods of a tenant being attached by sequestration and thus made unavailable for furnishing other premises, at least if the sequestration has been removed before the ejection.¹⁸² When a tenant voluntarily quitted possession on intimation of a warrant of ejection obtained against his immediate predecessor by a party claiming a right preferable to that of his author, there was no claim for damages by the tenant against his author since there had really been no disturbance of possession.¹⁸³

III. REMOVINGS TO WHICH ACT 1555 AND A.S. 1756 DO NOT APPLY—SUMMARY REMOVINGS.

Summary removing.

It has been the unfortunate habit of Scottish lawyers to apply the term 'summary' to all removings which are not regulated by the Act of 1555 and the Act of Sederunt of 1756. In one sense all removings are summary, and have been so treated in Acts of Sederunt.¹⁸⁴ In another sense the first class of removings now to be described is only summary from the circumstance that, though warning is required, and the period thereof is normally the old space of forty days, yet the provisions of the old Act relating to the form of warning and the necessity of keeping Whitsunday in view, were not compulsory.¹⁸⁵ The necessity for action

From urban tenements.

¹⁷⁸ *Douglas v. Walker*, 1825, 3 S. 534 (N.E. 370).

¹⁷⁹ *Macgregor v. E. Strathallan*, 1864, 2 M. 1339, *supra*, p. 494.

¹⁸⁰ *Bisset v. Whitson*, 1842, 5 D. 5.

¹⁸¹ *Tait v. Paton*, 1825, 4 S. 208 (N.E. 211).

¹⁸² *Ibid.*; and the better opinion seems to be that even if the sequestration had subsisted, the landlord's only obligation would have been to find the furniture

house-room. See case of detention of tenant's goods after his ejection—*Davidson v. Dunbar*, 1826, 4 Mür. 40.

¹⁸³ *Anderson v. Abel*, 1854, 16 D. 796.

¹⁸⁴ *Supra*, pp. 493, 495.

¹⁸⁵ An early illustration is *Ker v. Fowles*, 1623, M. 13855; and the distinction is succinctly drawn in *Hart v. Tenants*, 1674, M. 3783; and see *Ker v. Muirhead*, 1632, 1 B.S. 192.

of removing exists equally in both cases, and, now that all actions in the Sheriff Ordinary Court are treated in the same fashion, the term 'summary' is no longer distinctive, so far as the proceedings in Court are concerned.¹⁸⁶ This is the case of removings from urban tenements at common law. But provision has been made for summary removings in the more obvious sense of the words by a statute which brings the procedure of the Sheriff Small-Debt Court to bear on removings from inconsiderable subjects held for short periods. This is the reform embodied in the Sheriff Court Act of 1838.¹⁸⁷ And in certain cases summary ejection appears as a substantive process—not merely as operative of a decree of removing. Of these in their order :

From subjects of small value.

1. *Urban Tenements and the like at Common Law.*

These are chiefly buildings and their pertinents—tenements 'having no relation to a country farm.'¹⁸⁸ Except in one respect, the rules as to removings from these are wholly customary, and vary with the locality in which the buildings are situated.

Urban tenements.

In burghs, whether burghs royal, of regality, of barony, or parliamentary,¹⁸⁹ the common practice¹⁹⁰ is that a burgh officer — authorised thereto at one time by special warrant from a magistrate; then by general warrant annually issued,¹⁹¹ and now simply *virtute officii*¹⁹² — chalks the most patent door of the building,¹⁹³ in the presence of one witness,¹⁹⁴ forty days before the term of removing,¹⁹⁵ which was of old, and is still, usually Whitsunday. The order of the landlord or his agent to the officer may be merely verbal; but the proper, though not the only available,¹⁹⁶ evidence of a warning is the execution sent in by the officer, which should be in writing or in print or partly in both.¹⁹⁷ The form of execution varies according as the warning has,¹⁹⁸ or has not,¹⁹⁹ been accompanied with intima-

In burghs—
Peace warning.

¹⁸⁶ Sheriff Lees (Styles, p. 296) points out modes of acceleration, where the circumstances demand it.

¹⁸⁷ 1 & 2 Vict. c. 119.

¹⁸⁸ Ersk. 2.6.47.

¹⁸⁹ 3 & 4 Will. IV. c. 77, sect. 30.

¹⁹⁰ The procedure of A.S. 1756 was adopted in *Shinas v. Fordyce*, 1777, 5 B.S. 572.

¹⁹¹ *Bartoun v. Duncan*, 1709, M. 13832.

¹⁹² *Jolly v. Stevenson*, 1781, M. 13865 (even *extra fines burgi*).

¹⁹³ Cr. 2.9.9; St. 2.9.40; Bankt. 2.9.52; Ersk. 2.6.47; Ross on Remov. 115; B. Pr. 1278; More's Notes, 256; *Robb v. Menzies*, 1859, 21 D. 277.

¹⁹⁴ 1 & 2 Vict. c. 114, sect. 32; 9 & 10 Vict. c. 67; *Robb v. Menzies*, *supra*, ¹⁹³.

¹⁹⁵ *Riddell v. Zinzan*, 1671, M. 13828 (before 30th November).

¹⁹⁶ *Per L. Deas* in *Robb v. Menzies*, ¹⁹³; *Hart v. Tenants*, 1634, M. 3783; *Scott v. Boyd*, 1829, 7 S. 592 (parole allowed; error corrected in execution).

¹⁹⁷ 1 & 2 Vict. c. 114, sect. 32.

¹⁹⁸ *Boyd*, Jud. Proc. 326; *Frazer*, Jud. Proc. 337; *Ross on Remov.* 119.

¹⁹⁹ *Robb v. Menzies* at 21 D. 278, 281 —after the warning to flit follow the words—'I also chalked.' V.R. 1858, 'at' and upon the most patent door of the 'said tenant's premises.'

tion to the tenant personally. The better opinion seems to be that chalking is sufficient warning, without further intimation;²⁰⁰ and a *dictum*, delivered *obiter*, which throws upon singular successors of a lessor though not on the lessor himself the duty of proving the tenant's actual knowledge of the warning,²⁰¹ seems to rest on no valid distinction of principle. It is not necessary that warning should be given on the premises, provided it be made to the party, either by personal service or at his dwelling-house. Therefore a warning to the tenant of a house and shop (separate subjects) given in the shop where the tenant resided was held good with regard to both.²⁰² As equipollent to chalking are, at common law, an acknowledgment by the tenant that intimation had been made to him timeously;²⁰³ and, by statute, in any case of removal from a house (other than a dwelling-house or building let along with land for agricultural purposes) the posting within the United Kingdom of a registered letter, signed by the person entitled to give notice of removal,²⁰⁴ in time to admit of its being delivered on or prior to the last date upon which by law such notice of removal must be given, addressed to the person entitled to receive such notice, and bearing the particular address of such person at the time, if the same be known, or, if the same be not known, then the last known address of such person.²⁰⁵

Acknowledgment.

Registered letter.

Period of warning.

There is a general agreement in the custom of removings that the period of notice or warning should be at least forty days; and the rule seems to be invariable where the warning is given not by the landlord ousting, but by the tenant 'overgiving,' though the customary intimation by the landlord is made earlier (1st January or Candlemas).²⁰⁶ And now by statute, 'Where a house (other than a dwelling-house or building let along with land for agricultural purposes) is let for any period not exceeding four calendar months, notice of removal therefrom shall, in the absence of express stipulation, be given as many days before the

²⁰⁰ Ibid.

²⁰¹ *Hamilton v. Harper*, 1669, M. 13827 (the case was one of liferent and fee not of singular succession); but see *Robertson v. Draffan*, 1885, 1 Sh. Ct. Rep. 81.

²⁰² *Scott v. Cook*, 1886, 24 Sc.L.R. 34.

²⁰³ *Tait v. Sligo*, 1766, M. 13864, Hailes 88 (the notice had been acted on; and chalking was not so firmly settled in Aberdeen as in Edinburgh).

²⁰⁴ *E.g. factor—Thomson v. Handyside*,

infra, ²⁰⁵; (he had let and his principal was abroad).

²⁰⁵ 49 & 50 Vict. c. 50, sect. 6, *infra*, p. 501; Appx. No. xi.; in imitation of the Citation Amendment Act of 1882, 45 & 46 Vict. c. 77. See case of sufficient citation, where the tenant had left the premises but had returned and got the writ in time under the door—*Thomson v. Handyside*, 1833, 12 S. 557.

²⁰⁶ *Nicol v. Grosset*, 1736, M. 13862; *Jack v. E. Kelly*, 1795, M. 13866.

'date of ish as shall be equivalent to at least one-third of the full period of duration of the lease.'²⁰⁷

To houses outside of burghs²⁰⁸ the same rule applies, that the mode of warning and removing is regulated by local custom,²⁰⁹ or by equivalent safeguards against oppression, and now partly by the above statute. The statutory mode of sending warning by registered letter gets over the difficulty of proving actual and timeous receipt of the notice by the tenant. If the intimation be made verbally, there must be proof that it reached him,²¹⁰ or some one entitled to bind him by receiving it, at some time beyond the period of warning.²¹¹ If intimation be made by ordinary post letter, a presumption of delivery in course of post may be raised, but nothing more.²¹² Proof of delivery of written notice timeously at the tenant's dwelling-house is sufficient to fix him with notice, and it is very doubtful whether he would be entitled to proof that the warning did not actually reach him in time.²¹³ The period of warning, where the lease is for a year at least, is the customary forty days,²¹⁴ and probably the same would be held in regard to half-yearly leases.

In respect to the day of removing from houses let with regard to the ordinary terms, an uniform rule was introduced by an Act passed in 1881,²¹⁵ but its scope was confined to houses within burgh. This statute was repealed, and its provisions extended to the whole country, by the Removal Terms (Scotland) Act, 1886.²¹⁶ The word 'house' means in the Act, a dwelling-house, shop, or other building, and their appurtenances, and includes a dwelling-house or building let along with land for agricultural purposes. The definitions of 'lease,' 'tenant,' and 'person' are of the widest kind, including all tacks, however constituted, all tenants under the same, and companies and corporations.²¹⁷ The mischief which the Act seeks to abate is that a custom has

Extra burgal houses.

Term-days for removing from houses—
28th May
and 28th
November.

²⁰⁷ 49 & 50 Vict. c. 50, sect. 5, following, extending, and repealing 44 & 45 Vict. c. 39, sect. 4.

²⁰⁸ See *supra* for composite subjects, p. 482.

²⁰⁹ Cr. 2.9.17; St. 2.9.38; Mack. 2.6.11; Obs. 155; Bankt. 2.9.52.58; Ersk. 2.6.47; B. Pr. 1278; Lundin v. Hamilton, 1758, M. 13845. See Frendraught v. Seton, 1699, M. 13832; Ramsay v. Conheath, 1630, M. 13826 (not a case of tenancy).

²¹⁰ Lambert v. Smith, 1864, 3 M. 43 (to wife who communicated the fact too late).

²¹¹ *Slowey v. Robertson*, 1865, 4 M. 1.

²¹² *Ibid.*

²¹³ Lambert, *supra*, 210.

²¹⁴ *Morris v. Allan*, 1839, 1 D. 667 *obiter* (the notice was served personally; see *per* L.J.-C. in Lambert); Lambert, 210, Slowey, 211.

²¹⁵ 44 & 45 Vict. c. 39. See Thomson v. Barclay, 1883, 10 R. 694.

²¹⁶ 49 & 50 Vict. c. 50, *infra*, Appx. No. xi.

²¹⁷ Sect. 3. There is a superfluous definition of 'burgh.'

existed in Scotland whereby, for the purpose of a tenant's entry to, and removal from a house, a period beyond the date of the legal term of entry or removal is allowed within which such entry or removal may take place, and that the period so allowed has not been uniform, but has varied according to local usage; and the leading enactment is as follows:—

Terms of entry
and removal
from houses.

4. Where under any lease entered into after the passing of this Act, the term for a tenant's entry to, or removal from, a house shall be one or other of the terms of Whitsunday or Martinmas, the tenant shall, in the absence of express stipulation to the contrary, enter to, or remove from, the said house (any custom or usage to the contrary notwithstanding) at noon on the twenty-eighth day of May, if the term be Whitsunday, or at noon on the twenty-eighth day of November, if the term be Martinmas, or on the following day at the same hour, where the said terms fall on a Sunday.

Notwithstanding anything in this Act contained, in all cases in which warning is required forty days before a Whitsunday or Martinmas term of removal, such warning shall be given forty days before the fifteenth day of May and the eleventh day of November respectively.

One result of this is that furniture which has been removed by a tenant in the interval between 15th and 28th May (or 11th and 28th November) is not attachable for the rent due for the half-year succeeding under a prorogation of a lease which is then expiring, since the new term of possession only begins to run on the later dates.²¹⁸

Miscellaneous
subjects.

It has been uniformly held that the solemnities of the old Statute of 1555 and of the Act of Sederunt of 1756 are not required in removings from other non-agricultural subjects, such as factories,²¹⁹ malt-kilns and barns,²²⁰ salt-pans,²²¹ and mines and quarries.²²² All that is demanded by the Courts is that there shall have been fair warning of the intention to remove the tenant or of his intention to quit; and in almost all this class of cases the terms of the lease bring it under the rules relating to probative tacks containing a definite ish.²²³

²¹⁸ Thomson *v.* Barclay, *supra*, ²¹⁵.

²¹⁹ Riddell *v.* Zinzan, 1671, M. 13828 (chiefly, however, as being in burgh).

²²⁰ Waugh *v.* Abercromby, 1684, M. 13830.

²²¹ Wallace *v.* Tenants, 1715, 5 B.S. 7.

²²² Wauchope *v.* Hope, 1767, M. 13847; Udny *v.* Brown, 1802, Hume 566.

Stair's view (2.9.38) of Preston *v.* L. Cockpen, 1610, M. 13820 (liferent) seems right. For 'to' in first line of report read 'by.'

²²³ *Supra*, p. 474. As to leases of feu-duties, customs, &c., see E. Darnley *v.* Campbell, 1742, M. 13839; E. Elgin *v.* Ms. Tweeddale, 1831, 9 S. 901.

If the warning be not obeyed, action of removing must be raised in common form.

2. *Removing from Small Holdings.*

In the year after the passing of the Sheriff Small-Debt Act,²²⁴ Sheriff Court Act, 1838.²²⁵ became law, which contains provisions (sects. 8-14) for summary complaint for removing being presented by any person authorised by law to pursue a removing²²⁶ to the sheriff of the territory, if the premises are 'houses or other heritable subjects in Scotland let for any shorter period than a year at a rent of which the rate shall not exceed £30 per annum.' Provision is made for service of the complaint and for the *inducia* being fixed (sect. 8); for procedure in absence, care being taken to preserve the defender's effects, if necessary, and for reponing (sect. 9); for the citation of witnesses and havers and the scale of fees allowed to the clerk and officers and of travelling expenses (sect. 10). The citation and further procedure are directed to be the same (so far as unaltered in the Act) as those established for small-debt causes,²²⁷ and 'where decree of removing is pronounced it shall be in the form or to the effect of Schedule (A), and shall have the full force of a decree of removing and warrant of ejection;²²⁸ and the judgments to be pronounced in such summary actions of removing shall be final and not subject to review, either in the Circuit Court of Justiciary or in the Court of Session' (sect. 11). Adjournment and written answers may be allowed of consent or on cause shown; caution for violent profits is exigible as in other removings²²⁹ (sect. 12); and, where it is found, written answers must be admitted (sect. 13). 'In all cases where written answers shall be ordered, such cases shall thereafter be conducted, as nearly as may be, according to the forms in use in ordinary processes of removing, and the judgment of the sheriff therein shall be subject to review in common form' (*ibid.*).

The appropriate forms of summary complaint; warrant thereon; Forms. citation; execution thereof; and decree are set forth in Schedule A appended to the Act. The form of the complaint adapts it either to an expired or to an expiring lease. It has been shown that the complaint is to be 'in the form or to the effect

²²⁴ 1 Vict. c. 41 (1837).

²²⁵ 1 & 2 Vict. c. 119. The sections now to be noticed are annotated in Sheriff Lees' Small-Debt Handbook, p. 129 *seq.*, and they are printed *infra*, Appx. No. ix.

²²⁶ *Supra*, p. 441.

²²⁷ See ²²⁴, ²²⁵.

²²⁸ *Supra*, p. 494. So that on failure to remove himself, the tenant may at once thereafter be ejected by the officers of Court.

²²⁹ *Supra*, p. 487.

Servant
tenants.

Irritancies.

Executory of
a removing.

Independent
remedy.

' of the schedule.' In order to comply with this provision, it is enough if, in describing the nature of the tenancy, there is sufficient to show that the complaint is properly brought under the statute. For instance, instead of inserting the dates of entry and of ish (as the statutory form prescribes) it is sufficient if a tenancy dependent on the hire of the tenant as the landlord's employee is described as from fortnight to fortnight (or other period) pending employment; and the termination of the tenancy (along with the employment) is stated to have occurred on a particular date.²³⁰ Moreover, the statute is put to a use which involves a further strain on the elasticity of its forms—a strain which is only justified by strong convenience. It is common in letting small urban subjects for a fixed period and monthly (fortnightly or weekly) thereafter, to stipulate that, if the tenant shall fall in arrear of rent, his lease shall thereupon terminate. In such cases the statutory form is varied so as to state the fact that arrears are due and that the defender refuses or delays to remove, although the period of his lease has expired.²³¹ This is in effect the enforcement of a petty irritancy, probably not contemplated by the legislature in passing the Act, and scarcely justified by its terms.

3. Ejection.

The function of the process known as ejection, as the mode of carrying out a removing where the tenant delays or refuses to quit, has been already described.²³² It is there a purely accessory procedure. It would have been well if the term had been confined to use in this sense only, more especially as quite enough of confusion is necessarily caused by the employment of the phrase 'action of ejection' in our old law to mean the suit which arises out of an ejection. Unfortunately the term has been further used in many instances, as equivalent to summary removings as above described. It is possible to minimise the inconvenience and at the same time to mark a distinct difference of principle by using the term 'summary removing' as applicable only to the procedure described in the foregoing pages, and by here confining the use of the word 'ejection' in its third sense (denoting a substantive, not a merely accessory process) to such cases as on the face of them disclose that possession is held *vi, clam, aut precario*; ²³³ or (to take a practical test) that tacit relocation is *ex hypothesi* inadmissible.

²³⁰ *Shotts Iron Co. v. Paton*, 1857, 19 D. 755; see as to similar cases, *infra*, p. 506.

²³¹ Following the second alternative of Sched. A, No. 1.—*Lees, Small-Debt*, 133.

²³² *Supra*, p. 494.

²³³ See 1457, c. 78, and Mack. Obs. thereto; St. 2.9.38; Bankt. 2.9.57; see authorities on possessory remedies collected in Rankine, *Landownership*, 8 *seq.*

(a) Heir of Liferent Tenant.

When a liferent tenant dies, his heir is not entitled to the benefit of that relaxation of the strict law which is allowed to a tenant holding of a liferent owner on the death of his landlord.²³⁴ The heir is deprived of all right of possession by the terms of the only title to which he could ascribe it. He may therefore be ejected summarily as a vitious possessor.²³⁵ The point was long debated, and was at last settled 'on the 'general ground,' in a case where, though the lease was taken to a minister during his incumbency,²³⁶ the rule was held to apply to all cases of tenant for life.²³⁷ An express extension of the right of possession to the heir or representatives for a year or so is not unknown: and the effect of it is merely matter of interpretation, from which no general rule can be elicited.²³⁸

Heir of liferent tenant.

In all these cases, however, the maxim applies—*messis sementem sequitur*. Thus where the tenant for life died on 19th April, his heir was held entitled to reap the crop so far as then sown, on paying a proportion of the rent; to be recompensed for the value of work done on the land not then sown, either before or after his death; and to be allowed a day's time to remove the effects; but to no other right of reaping, grazing, or residence.²³⁹ It may, however, be of some importance to note that an obligation imposed on the tenant and his heirs in a long lease ending with a liferent, to remove 'the Whit-sunday next and immediately after the expiration of their 'tacks' did not entitle the representatives of the last (the liferent) tenant who died in March, to sow in the interval, and thereafter to reap what was so sown, their right in the interval being merely to personal occupation.²⁴⁰

Right to crop sown.

²³⁴ *Supra*, p. 482.

²³⁵ Balf. 458; Cr. 2.9.13; St. 2.9.38; Mack. 2.6.11, Obs. 155; Bankt. 2.9.57. Ersk. 2.6.49 is *contra*, and founds on Rowallan v. Boyd's Relict, 1630, M. 13825, 1 B.S. 306, where a widow was allowed warning, but the point is settled as above; see *supra*, p. 482, and Tennent v. Tennent, 1760, M. 13845; Crawford v. Whiteford, 1778, 5 B.S. 620 (*per* L. Braxfield).

²³⁶ Gordon v. Michie's Reps., 1794, M. 13851. The same as to tenants of manse or glebe—Couper v. Bruce, 1692, M. 13831; Maccallum v. Grant, 1826, 4 S.

527 (N.E. 535); More's Notes, 256; Duncan, Paroch. Eccl. Law, 399, 517.

²³⁷ Stewart v. Grimmond's Reps., 1796, M. 13853; cf. Johnston's Trs., 1803, M. 15207, in contrast.

²³⁸ *Ms. Tweeddale v. Somner*, 1845, 17 Sc. Jur. 198.

²³⁹ Stewart, *supra*, ²³⁷. In Tennent, *supra*, ²³⁵, the death was in December, and no question as to crop arose. In Gordon, *supra*, ²³⁶, it was in June, and the right to the crop was admitted.

²⁴⁰ *Ms. Tweeddale v. Murray*, 1846, 8 D. 411, rev. 6 B. Ap. 125.

(b) Employees.

Occupancy incident to service.

Many officials have house-room as part of their salary.²⁴¹ Menial servants frequently live beyond the walls of the house in or about which they are employed. And on large farms, near factories and mines, and in other places where a number of workmen are employed, it has long been not unusual, and, since the increase of industrial enterprise in the present century began, it has become common, to make possession of a house in the neighbourhood of the work a part of the wage; or for the employer to let out to his servant suitable accommodation at a fixed rent. In the former case it is implied, and in the latter case it should be expressly stipulated (if such be the intention), that on ceasing to be employed at the work, the right to possess (as servant or tenant²⁴²) should cease also. And the employer's remedy, in case of the servant's refusal to remove, is by petition for instant ejection presented to the sheriff, or for summary removing under the Sheriff Court Act of 1838.²⁴³

Cases.

Thus, where a lease of mineral came to an end, the miners were allowed by the landlord to remain for three months beyond in the cottages which they had either built themselves or got from the tenant without rent. The landlord charged, on letters of horning, both the tenant and the miners to remove. It was held to be clear that no formal warning forty days before Whitsunday was necessary for ejecting the miners. At the same time it might have borne hard on these poor people to turn them out summarily without any premonition, and fifteen days' warning was allowed them.²⁴⁴ This indulgence was evidently allowed *ex gratiâ*, probably on account of the unusual difficulty in a remote hill village (Wanlockhead) of obtaining other accommodation. A later case, though it related only to workmen engaged by the piece or job, may be taken as laying down the rule applicable to all cases in which the possession of houses is terminable with and parcel of a contract of service, though, as already mentioned, the most convenient form of process in modern times is that which is prescribed by the Sheriff Court Act of

²⁴¹ Whyte v. Haddington, Sch. B, 1874, 1 R. 1124 (summary ejection of a schoolmaster dismissed from office).

²⁴² As to the distinction see Fraser, M. and Servant, 7, 332. In the case of menial servants, whether resident under separate roof or within the mansion-house, the ejection may take place *vid facti*, provided no unnecessary violence be used

—Scott v. M'Murdo, 1869, 6 Sc.L.R. 301; cf. Scougal v. Crawford, 1819, 2 Mur. 110.

²⁴³ 1 & 2 Vict. c. 119, sects. 8 *seq.*, *supra*, pp. 503-4, and Shotts Iron Co. v. Paton *there*.

²⁴⁴ D. Queensberry v. Telfer, 1756, M. 13843 (reserving any right those who had built might have for recompense).

1838.²⁴⁵ Calico-printers, engaged by the piece, were, as part of their contract, accommodated with houses near the print-field, for which they paid a fixed rent by way of deduction from their wages every four weeks. Some of them being dismissed, others intimated their resolution to leave on the completion of the jobs then on hand, and the manager acquiesced. In spite of this termination of their service, many of the workmen refused to remove from their houses and yards, and a petition praying for their immediate removal was presented to the sheriff, who granted decree for summary removing. A suspension of the decree was refused, overruling the contention on behalf of the workmen that they held the premises not as part of their wages but for specific rents; that they were entitled to the benefit of a lawful warning for the ensuing Whitsunday; and that other dwelling-houses could only be had at the legal term days.²⁴⁶

(c) *Squatter.*

A third case in which a petition for summary ejection is the appropriate remedy is where the defender is a mere squatter, possessing (or rather occupying) with no shadow of title. But to examine the rules which regulate the right to take proceedings at law or *viâ facti* against such intruders would be to stray beyond the scope of this work into the law of landownership.²⁴⁷ It need only be added that the proprietor does not have to make up his mind in what capacity the person he seeks to oust may pretend a right to possess; he may call him as 'tenant or 'possessor or pretended tenant or possessor,' since it may turn out in the course of the proceedings that an alleged title of tenancy is open to objection.²⁴⁸ If the proprietor discards the alternative he had formerly to stand or fall by the instance he has chosen;²⁴⁹ but the form of pleadings is now elastic enough to allow of amendment *pendente processu*, so that complete justice may be done.

(d) *In Enforcement of Obligation to Plenish.*

Ejection in the cases noticed above is a definitive process depriving, once and for all, the defender of right and title to possess. Mention has, however, been made of another application

²⁴⁵ *Supra*, p. 503.

²⁴⁶ *Young & Co. v. Paton*, 1808, Hume 582.

²⁴⁷ See *Macdonald v. Ds. Leeds*, 1860, 22 D. 1075; *Hally v. Lang*, 1867, 5 M. 951; *Macdonald v. Watson*, 1883, 10 R. 1079, and cases in Rankine, Landowner-

ship, pp. 9 *seqq.* As to lease without ish, see *Orr v. Rannie*, 1872, 9 Sc.L.R. 337.

²⁴⁸ *Nisbet v. Aikman*, 1866, 4 M. 284.

²⁴⁹ *Waterstone v. Mason*, 1864, 8 D. 944; *Hally v. Lang*, *supra*, ²⁴⁷.

of the remedy, in which the right to possession is held to be only suspended till an obligation incumbent on the tenant with its sequels is fulfilled. This is the result where ejection is ordered on failure of the tenant of a house to furnish it sufficiently in compliance with a decree.²⁵⁰

Jurisdiction.

In all cases of summary ejection (in spite of an antiquated doubt founded on their being in certain circumstances extraordinary remedies) the Sheriff Court has jurisdiction.²⁵¹ And within burgh, the Burgh Court is equally competent.²⁵² Even where immediate or instant ejection is demanded, the judge may allow some short period at his discretion,²⁵³ usually till noon forty-eight hours after decree.

NOTICE BY TENANT OF INTENTION TO QUIT.

Such being the powers of a landlord in the matter of removing a tenant and the mode prescribed by the law for effecting that purpose it only remains to state in a few words what is incumbent on a tenant desiring to quit at the natural termination of his lease. The rule is that he must give notice or warning to his landlord of his intention to quit; and the period of warning must be equivalent to that which his landlord would have been bound to allow, if the initiative came from him.²⁵⁴ It has been shown that the notice of termination of a tenancy prescribed by the Agricultural Holdings Act²⁵⁵ is treated in the same way, whether it is given by landlord or by tenant.

Unless the landlord warns or the tenant notifies in due time, tacit relocation takes place.²⁵⁶

²⁵⁰ *Supra*, p. 351; esp. *Wright v. Wightman*, 1875, 3 R. 68; *Cunningham v. Black*, 1883, 10 R. 441; and *Thomson v. Handyside*, *infra*,²⁵².

²⁵¹ See *Nisbet v. Aikman*, 1866, 4 M. 284, for the literature and close of the controversy.

²⁵² *Thomson v. Handyside*, 1883, 12 S. 557; *Robb v. Menzies*, 1859, 21 D. 277.

²⁵³ The alternative is allowed in 1 & 2 Vict. c. 119, Sched. A, No. 5; and may be followed as declaratory of the law or by analogy.

²⁵⁴ *Mackintyre v. Macnab's Trs.*, 1829, 8 S. 237, aff. 5 W. and S. 299.

²⁵⁵ 46 & 47 Vict. c. 62, sect. 28, *supra*, p. 479.

²⁵⁶ See next chapter.

CHAPTER XXII.

TACIT RELOCATION.

THE rule of the Roman law, '*taciturnitate utriusque partis colonus reconduxisse videtur*,'¹ is a special application of a rule which obtains in other departments of the law,² and, in the law of landlord and tenant, not to rustic subjects only, but to tenants of all subjects capable of being let. The doctrine of the Roman law, which has also been adopted in France³ and Germany,⁴ has descended to us under some modifications of little importance, and under the name of tacit relocation.⁵ In England the civil law is not followed; but similar results accrue from the right to sue on use and occupation against one who 'holds over' after the close of his term.⁶

After the exposition which has just been given of the law of removings, it will be enough to say that tacit relocation—a constructive renewal of a lease—operates wherever (1) summary ejection (in the sense described at the close of last chapter) is incompetent, and (2) effectual steps have not been taken for removing,⁷ or, after having been taken, have been abandoned or passed from.⁸

¹ 13, § 11 D. (19.2) and next fragment. See also 16 C. (4.65). See the commentary on these texts in Vangerow, *Pandekten*, iii. 456.

² *E.g.*, Partnership—Clark on P. ii. 657; Neilson v. Mossend Iron Co., 1884, 12 R. 499, rev. 13 R. (H.L.) 50, 11 App. Cas. 298. Hiring of servants—agricultural, domestic, and the like, Fraser, Master and Servant, 58; Lennox v. Allan, 1880, 8 R. 38.

³ Code Nap. 1738; Pothier, *Louage*, p. 182 (under the name 'reconduction,' which is the more classic term).

⁴ Preuss. Landrecht, i. 21.325.

⁵ Balf. 208; Cr. 1.11.4, 2.9.10; St.

2.9.23, 4.26.14 *seq.*; Mack. 2.6.7; Bankt. 2.9.32; Ersk. 2.6.35; B. Pr. 1265.

⁶ Woodfall (13th ed.), 542. The 'tenant-right of renewal' is not analogous—see *ibid.* p. 373.

⁷ Bp. *Argyll v. Commissary*, 1669, 1 B.S. 576. See case of a new bargain, *Macbrair v. Romes*, 1682, M. 15320.

⁸ Ersk. 2.6.35; Bruce v. Bruce, 1610, M. 15314; Bp. of *Argyll v. Walker*, 1672, M. 15318; *Carnousies v. Keith*, 1616, M. 15315; and as to prescription, *supra*, p. 486, and see E. Aboyne v. Vassals, 1679, M. 15319 (removing of vassals after forfeiture).

Origin in
Roman law.

When it sets
in.

Not in judicialeases.

If these circumstances concur, tacit relocation sets in, whatever may have been the mode in which the original lease was constituted, by writ or verbally, with or without the help of *rei interventus*.⁹ There is one exception: judicial leases granted under the authority of the Court by which an estate has been sequestrated. So that lessees holding over after the lapse of the period for which the Court let the subjects, are accountable for the proceeds, not as tenants, but as factors or stewards. For the Court of Session never warns a tenant; and the caution, which is essential to a judicial lease, lapses with the expiration of the fixed period.¹⁰

Subjects.

Whatever may be subject of a lease may fall under tacit relocation.¹¹

Parties.

It is no bar to tacit relocation that the party who would have had an interest to arrest it is incapacitated from doing so by insanity,¹² or nonage, or death.¹³ On the other hand, the right to found on a plea of tacit relocation is not lost by the death of the person entitled to claim it, since it descends to his heir.¹⁴ Where there is subtenancy, it is not enough for the landlord to warn a subtenant alone, if the latter has not been recognised as tenant directly responsible to the landlord, or if the principal tenant is still bound for the rent, though he has given up the natural possession.¹⁵ If so recognised,¹⁶ or if a new title has been acquired,¹⁷ the principal tenant, being thus ignored, need not be warned. There is neither reason nor modern authority for the proposition that 'there can be no tacit relocation where the tacksman had, before the contemplated ish, quitted the natural possession in favour of a subtacksman.'¹⁸ There seems, on the

⁹ *Supra*, p. 89 *seq.*; St. 2.9.23; Bankt. 2.9.32; Ersk. 2.6.36; 2 Bell, Leases, 133; E. Errol v. Ury Parishioners, 1663, M. 15318.

¹⁰ Ersk. 2.6.36. As to leases of grass parks see *supra*, p. 482; M'Harg, 1805, M. Removing, Appx. 4.

¹¹ Feu-duties, teinds, and the like—Bp. of Argyle v. Walker, 1672, M. 15318; Dunfermline's Creds. v. Offrs. of State, 1805, M. 15320; E. Darnley v. Campbell, 1741, M. 15322. The case of York Buildings v. Stewart, 1742, Elch. Tack, No. 7, seems bad law.

¹² Cr. 2.9.11; 2 Bell, Leases, 133; cf. the distinctions in 14 D. (9.2); Voet. *apud*. 2 D. (9.2); Pothier, Louage, 184.

¹³ Dirl. 342. Of the cases of L. Bargenie v. Stuart, 1621, M. 15167, and

Hill v. Wright, 1628, M. 16477, the one turned on a benefit being taken by a curator to himself in a roundabout way, and the other was a question of real or personal right.

¹⁴ Hume v. Macleod's Reps., 1808, Hume 583 (death of tenant unwarned on 19th April).

¹⁵ Thomson v. Harvie, 1823, 2 S. 581 (N.E. 498); Lockhart v. Ogston, 1745, M. 13814.

¹⁶ Ly. Lauriston v. Tenants, 1632, M. 13810; D. Queensberry, 7th July 1810, F.C. 743.

¹⁷ Richard v. Kirkland, 1663, M. 13812.

¹⁸ Ersk. 2.6.36. See Balf. 208; St. 2.9.23; E. Morton v. Scot, 1580, M. 15314.

contrary, to be no reason for refusing to the principal tenant, who is in civil possession by levying the subrents, the benefit of the natural possession had by his subtenant with all its advantages.

Either party is barred from setting up tacit relocation by entering into a fresh agreement, since that becomes the footing on which possession is continued;¹⁹ or by not actually taking or keeping possession (civil or natural) after the ish. Thus, where a tenant died about twelve months before the ish, and the heir living in London never interfered with the farm, which was managed by his younger brothers, these possessors were held not to be entitled to plead tacit relocation either in their own right (which was naught) or as managers for their brother, who had never taken possession or even been heard of by the landlord.²⁰ And neither party can support a claim to sit on or to prevent removal in a question with the singular successors of the other by founding on a merely personal obligation, inferring an extraordinary privilege in regard to warning.²¹

Conversely, singular successors of a tenant—assignees whose title has been intimated to the landlord—are not bound by their cedent's obligation to remove dated subsequently to their title;²² and either party is barred from objecting to a plea of tacit relocation by paying or accepting forehand rent applicable to any period subsequent to the date with reference to which removing is sought to be enforced;²³ and in this respect services performed are in the same position as rent paid, provided they have been performed at the order or sight of the landlord or of some one entitled through him to exact them.²⁴ Or, as has been said above, the plea may be taken that by continued possession (had or allowed) or otherwise, the right to quit or to oust has been passed from. A strong instance of this is to be found in a case in which the landlord sequestrated in security grain in the lofts he had let. The sequestration being recalled on condition of caution being found, and no caution having been actually found, the grain remained in the lofts until after the term. The tenant was held liable for the rent of the year following, there having been no compulsion to retain the grain on the premises.²⁵

Barred—
By new
agreement;
By abandon-
ment.

Objection
barred.

¹⁹ *Blain v. Ferguson*, 1840, 2 D. 546.

²⁰ *Wilson v. Stewart*, 1853, 16 D. 106.

²¹ *Trotter v. Lanceman*, 1804, Hume 814. But qy. whether the privilege of six months' warning ought to have been held to run with the lands.

²² *Bett v. Murray*, 1845, 7 D. 447.

²³ Or *herezeld*, Balf. 208; Cr. 2.10.11;

St. 2.9.25; Bankt. 2.9.35; A v. B, 1616, M. 15315; *Ogilvy v. Mairns*, 1618, M. 15315.

²⁴ Therefore *Lochinvar*, 1633, M. 15317, would probably be otherwise decided now. See *Mackintyre v. Macnab's Tra.*, *supra*, p. 508.

²⁵ *Robertson & Co. v. Drysdale*, 1834, 12 S. 477.

Nature of the right.

In a recent case relating to partnership,²⁶ the operation of tacit relocation is thus succinctly described by Lord Watson: ²⁷ 'When the members of a mercantile firm continue to trade as partners after the expiry of their original contract without making any new agreement, that contract is held in law to be prolonged or renewed by tacit consent, or, as it is termed in the law of Scotland, by "tacit relocation." The rule obtains in the case of many contracts besides that of partnership; and its legal effect is that all the stipulations and conditions of the original contract remain in force, in so far as these are not inconsistent with any implied term of the renewed contract.' The same remarks apply *mutatis mutandis* to the contract of lease.²⁸

Duration.

As in partnership law, so in the law of leases, whatever be the other implied innovations on the original contract, there must, *ex hypothesi*, be a change in the duration of the contract as renewed. In partnership, the copartnery becomes determinable at will. In leases, the tenure cannot be left so precarious—in some cases because the course of the seasons, in others because the system of letting at terms, are essential elements in the convenient disposal, acquisition, and holding of the subjects let. Hence has sprung the rule which obtains, irrespective of the nature of the subject let, that a lease for a year or for a longer period is prolonged by tacit relocation for a year, and thereafter from year to year; and that a lease for a shorter period is prolonged for a like period, and so on from time to time.²⁹ This prolongation is such an innovation on the contract, as liberates a cautioner for the rent.³⁰

²⁶ Neilson v. Mossend Iron Co., *supra*, 2.

²⁷ At 13 R.(H.L.) 54, 11 App. Cas. 308.

²⁸ The same rule is put in other words by L. Chan. Cottenham in Wemyss v. Drysdale, 1849, 6 B. App. 455, 461, 'It is gone as to time, but it remains 'obligatory as to the special provision.'

²⁹ The first part of this rule is amply vouched—Balf. 208; Cr. 1.11.4, 2.9.10; St. 2.9.23, 4.26.14; Mack. 2.6.7; Bankt. 2.9.32; Ersk. 2.6.35; B. Pr. 1265. The latter part is implied therein and in the nature of the right.

³⁰ *Supra*, p. 362; Forbes v. Ly. Saltoun's Exrs., 1735, Elchies, Cautioner, 4.

CHAPTER XXIII.

THE CROFTERS HOLDINGS (SCOTLAND) ACT, 1886.

THIS Act¹ relates to a class of holdings so peculiar, and deals with them in a way so novel, that it has been thought expedient to keep an examination of its provisions separate from the rest of this work, rather than to introduce a notice of the innovations it operates into those pages which deal with the rights of landlord and tenant at common law that are thus affected. The statute followed in time and in spirit the Irish land legislation, of which the principal monuments are the Landlord and Tenant Act of 1870 and the Land Act of 1881; and it followed, in time at least, a Report of a Royal Commission appointed in 1883 to inquire into the condition of the crofter population in the Highlands and Islands of Scotland. The object of the Act is to create a new tenure, or to give the force of enacted law to an existing custom, whereby certain classes of tenants in certain parts of Scotland are secured against disturbance and enhanced rent, so long as they fulfil certain conditions. And the machinery provided for this limited interference between landlord and tenant is a permanent body called the Crofters Commission.

The scope of the Act may best be studied in the definitions it contains or incorporates. A *crofter*² is one who at the passing of this Act is tenant of a holding from year to year, who resides on his holding, the annual rent of which does not exceed £30 in money and which is situated in a crofting parish,³ and the

Scope—terminology.
Crofter.

¹ 49 & 50 Vict. c. 29. It is printed along with Rules in Appx. No. xii. Soon after the Act passed it was most ably and acutely analysed and annotated by Mr. C. N. Johnstone, Advocate, who added a set of suggested forms, many of which have not been superseded by the official forms issued by the Commission. In the preparation of this chapter I have re-

ceived invaluable information from Sheriff Brand, but he has no responsibility for its contents.

² The question whether an applicant holds this character may be determined summarily by the Commission (sect. 21).

³ Defined, sect. 34; and determined by the Commission subject to confirmation by the Secretary for Scotland. The coun-

Cottar.	successors of such person in the holding being his heirs or legatees. A <i>cottar</i> is the occupier of a dwelling-house situate in a crofting parish, with or without land, who pays no rent to the landlord; as also the tenant from year to year of a dwelling-house situated in a crofting parish, who resides therein and who pays to the landlord therefor an annual rent not exceeding £6 in money, whether with or without garden ground, but without arable or pasture land (sect. 34).
Permanent improvements.	<i>Permanent improvements</i> are dwelling-houses, farm offices, subsoil or other drains, walls and fences, deep trenching, clearing the ground, planting trees, making piers or landing-stages, roads practicable for carriages from the holding or holdings to the public road or the seashore; and all other improvements, which in the judgment of the Crofters Commission shall add to the value of the holding to an incoming tenant (sect. 34 and schedule).
Holding.	A <i>holding</i> is any piece of land held by a crofter consisting of arable or pasture ⁴ land or of land partly arable and partly pasture and which has been occupied and used as arable or pasture land (whether such pasture land is held by the crofter alone or in common with others) immediately preceding the passing of this Act, including the site of his dwelling-house and any offices or other conveniences connected therewith, but does not include garden ground only, appurtenant to a house (sect. 34).
Lease.	<i>Lease</i> means a letting of or agreement for the letting land for a term of years or for lives, or for lives and years, or from year to year.
Landlord.	<i>Landlord</i> , in relation to a holding, means any person for the time being entitled to receive the rents and profits of or to take possession of, any holding. ⁵
Tenant.	<i>Tenant</i> means the holder of land under a lease. <i>Landlord or tenant</i> includes the executors, administrators, assignees, legatee, donee, or next-of-kin, guardian, curator <i>bonis</i> , or trustees in bankruptcy of a landlord or tenant.
Person.	<i>Person</i> includes a body of persons and a

ties are Argyll, Inverness, Ross and Cromarty, Sutherland, Caithness, Orkney and Shetland (sect. 19); and all the parishes in these counties, with the exception of seventeen, have been determined by the Commissioners to be 'crofting parishes,' their determination being in every case confirmed by the Secretary. The seventeen parishes in regard to which the information has not enabled the Commissioners as yet to come to this finding are (in Argyll) Campbelltown, Craignish, Dunoon and Kilmun, Gigha and Cara, Killeen and Kilkenzie, Kilmartin, Kil-

modan, Saddell and Skipness, Southend; (in Inverness) Cawdor, Croy; (in Ross and Cromarty) Cromarty, Fearn, Rosemarkie; (in Orkney) Kirkwall and St. Ole, Stromness.

⁴ As to pastoral holdings under the Irish Acts see *Carr v. Nunn*, Ir. R. 1 Reg. 89; *O'Brien v. White*, 16 L.R. (Ir.) 15; *Harper v. Davies*, 12 L.R. (Ir.) 23; *Westropp v. Elligott*, 9 App. Cas. 815. Including servitudes appertaining,—see *ex parte Hutchison*, 12 L.R. (Ir.) 79.

⁵ Including a lessee—*Keith* (Sutherland) 26th March 1887.

corporation. And *sheriff* includes sheriff-substitute.⁶ The scope of the Act is further narrowed by saving from its operation (1) Savings. holdings or buildings (a) let to a person during continuance in any office, appointment, or employment⁷ of the landlord, (b) let at a nominal rent or without rent as a pension for former service or on account of old age or poverty, (c) let to a person during his tenure of any office such as that of a minister of religion or schoolmaster; and (2) any innkeeper or tradesman placed in the district by the landlord for the benefit of the neighbourhood (sect. 33).

The only one of these definitions which has been solemnly construed by the Commission is that of 'crofter.' A person who relies on and pleads the terms of a lease in support of his application places himself beyond the purview of the Act.⁸ A person who admitted he took possession in terms of written 'conditions for a lease'—which contemplated a tenure for years—and who in consistency with his expectation to hold under them for years applied lime to the land in large quantity was held to be a leaseholder not a crofter.⁹ A person who occupied along with his son land feued to the latter was held not to have proved himself to be a tenant of the superiors.¹⁰ A tenant from year to year is none the less a crofter because he possesses on tacit relocation after the close of a lease for years, either on account of no proceedings having been taken for then removing him or on account of proceedings not having been effectually carried out;¹¹ nor because his lease has been reduced to writing.¹²

The Crofters Commission consists of three Commissioners¹³—one of them a person who can speak Gaelic, and one an advocate of ten years' standing—and is empowered to appoint officers, such as valuers, assessors, clerks, &c. (sect. 17). It has to report annually to the Secretary for Scotland (sect. 18), who also prescribes the place, order in time, and rules for its sittings (sect. 17). No limit is set to the duration of the Commission; but its powers in one respect (the enlargement of crofts) lapse in five years after 25th June 1886 (sect. 22). It may delegate any of its duties to two of its number, subject to review by all three

⁶ The definitions of the Agricultural Holdings Act (46 & 47 Vict. c. 62, sect. 42) so far as here applicable (Crofters Act, sect. 34).

⁷ Not merely occasional jobs—Keith.⁵

⁸ Macleod, Dornoch, 30th Dec. 1886.

⁹ Robertson, *ibid*.

¹⁰ Mackenzie, *ibid*.

¹¹ Mackenzie, Dornoch, 14th Oct. 1886.

¹² Tulloch, *ibid*.

¹³ The first Commission consists of Mr. David Brand, Advocate, Sheriff of Ayrshire; Mr. W. Hosack, Oban; and Mr. P. B. M'Intyre, Mains of Findon, Ross-shire.

(sect. 23). Or it may be ousted by the parties agreeing on a sole arbiter, whose award has the effect of one of its orders (sect. 30). Any party may demand and the Commission may order that the evidence be taken on oath (sect. 24). The Commission may, subject to the approval of the Secretary for Scotland, frame and issue forms of application and procedure; make rules with reference to proceedings; and with the approval of the Treasury fix a scale of costs and fees and provide for taxation thereof (sect. 29). It has full discretion in regard to expenses (sect. 24); and its decision 'in regard to any of the matters committed 'to its determination' is final (sect. 25). The sheriff-clerk keeps the 'Crofters' Holdings Book' for recording every order of the Commission, along with the application and any other proceedings the Commission directs to be entered. Applications are to be addressed to him for transmission to the Commission (sect. 27). The Sheriff-Court houses and the officers of the Court are at their disposal when not required by the sheriffs (sect. 28). And decree conform to any order may be pronounced by the sheriff on being satisfied of its conformity with the provisions of the Act (sect. 28). Such is the machinery provided by the Act.

Rules of the
Commission.

The rules¹⁴ issued by the Commission provide for a central office in Edinburgh; the fixing, variation, and adjournment of sittings; the forms of application, their authentication, lodging, and amendment; representation through a law-agent or friend; intimation; custody and exhibition of the process; stamping; the conjoining of applicants and respondents; the massing and sisting of processes; and the rehearing of cases decided by two Commissioners.

Subject of
the Act.

The 'matters committed to the determination' of the Commission are to be found in the first half of the statute. This—the substantive—part of the Act deals with six different matters, viz., security of tenure, rent, renunciation of tenancy, compensation for improvements, enlargement of holdings, and bequest of holdings.

1. *Security of Tenure.*

Statutory
conditions.

A crofter although he cannot assign his tenancy, cannot, on the other hand, be removed from his holding except in consequence of the breach of a statutory condition, *i.e.*, by failure to pay rent when payable; or executing an assignation; or persistently dilapidating buildings; or, after specific notice to desist, deterio-

¹⁴ The rules, forms, and scale of fees issued by the Commission follow the Act in Appx. No. xii.

rating the soil; or, without the landlord's consent in writing, subdividing the holding, subletting it or part of it, or erecting or suffering to be erected on it any dwelling-house otherwise than in substitution for those already there on 25th June 1886; or violating any condition legally applicable to the holding, and by the Commission found reasonable; or becoming notour bankrupt or executing a trust-deed for behoof of creditors; or obstructing the landlord or persons authorised by him in the exercise of any right reserved or conferred as in the Act; or, without the landlord's consent, opening a house on the holding for the sale of intoxicating liquors. The right reserved to or conferred on the landlord, subject to compensation for damage, is to enter for any of the following purposes:—mining or taking minerals, or digging or searching for minerals; quarrying or taking workable mineral; cutting or taking timber or peats, except timber planted by the crofter or his predecessors, being of the same family, or timber necessary for ornament and shelter, or peat required for the holding; opening or making roads, fences, drains, and water-courses; access to and from the shore in exercise of right; inspection; and taking game, fish, wild birds, or vermin (sect. 1). The Commission may, on the application of the landlord and upon being satisfied that he desires to resume the holding or part thereof for some reasonable purpose having relation to the good of the holding or of the estate—of which some examples are given—authorise resumption upon such conditions as it thinks fit, and upon adequate compensation being made, in land, reduction of rent, money down or otherwise (sect. 2). A year's arrear of rent lets in the procedure for removing contained in the 27th section of the Agricultural Holdings Act;¹⁵ arrear of two years' rent lets in the procedure of the 4th section of the A.S. of 1756.¹⁶

Rights reserved to landlord.

Resumption.

2. *Rent.*

This boon of fixity of tenure would have been purely delusive if a landlord had still been entitled, as at common law, to raise the rent whenever and to whatever height he chose on the lapse of a current bargain. It has been seen that the payment of rent is one of the statutory conditions. The amount is fixed as follows. It is the rent (including money and prestations other than money) payable for the year current on 25th June 1886, unless altered in one of two ways (sect. 4); either (1) by agreement, to last for the period stated therein and thereafter until a new agreement is made or the second mode is adopted (sect. 5);

Rent, agreed on.

¹⁵ *Supra*, p. 461.

¹⁶ *Supra*, p. 460.

Fixed (fair)
rent.

or (2) by the fixing of a fair rent—known as the fixed rent—by the Commission on the application of either party after he has given intimation to the other party, and after the Commission has appointed a time and place for hearing and has heard the parties with or without assessors, and, if it thinks fit, after a visitation of the holding or after consideration of a report from a valuer or valuers (sects. 6, 20). The rent thus ‘fixed’ is payable as from the first term of Whitsunday or Martinmas next succeeding the decision, and cannot be altered, except through agreement, for seven years after such term [sect. 6 (2)]. If the fixed is less than the old rent, over-payments may be deducted in respect of the period between the date of the application and the date when the rent was fixed¹⁷ [sect. 6 (3)].

Arrears.

Under an application for a fixed rent, arrears of rent may be dealt with in either of two ways: (1) They may be let alone; or (2) the Commission may take evidence of all the circumstances which have led to such arrears, and decide whether the whole or what part of them should be paid, and whether in lump or by instalments fixed in amount and date [sect. 6 (5)]. But in each case there is the proviso that the Commission may sist all proceedings for the removal of a crofter in respect of non-payment of rent till the application is finally determined [sect. 6 (4)].

Criteria of fair
rent.

This determination of a fixed rent payable for seven years, and this interference with arrears in the discretion of the Commission make up the principal part of the ordinary work of the Commission. The mode in which arrears are dealt with will principally depend on the fairness of the rent of which they are an accumulation. So that it is important to observe what light is thrown on the cardinal question—how a fair rent should be fixed—by the Act itself. The sole hints are contained in the definition of what are reasonable terms of letting lands available for enlargement of holdings, viz., terms such ‘as are usually obtained in the ‘letting of land of the like quality, and similarly situated in the ‘same district for other purposes than that of a deer-forest, or of ‘a grouse-moor, or other sporting purpose’ (sect. 11), and in the more direct injunction that the determination is to be made by ‘the Commission after considering all the circumstances of the ‘case, holding, and district, and particularly after taking into ‘consideration any permanent or unexhausted improvements on ‘the holding and suitable thereto, which have been executed or ‘paid for by the crofter, or his predecessors, in the same family’

¹⁷ This probably means the date when this rent became current. See last subsect., and Johnstone, Crofters, 25 n.

[sect. 6 (1)]. These improvements are, of course, 'taken into 'consideration' for the purpose of securing that the crofter shall not pay twice for them,—once when they were executed and again in the form of enhanced rent.¹⁸

The only indication of the view which the Commissioners take of this section, read in connection with the ordinary meaning of a fair rent, is given in a judgment which raised the further question whether improvements made by an applicant or his predecessors in pursuance of a written agreement,—contained for example in a lease which has lapsed—could be taken into consideration. 'The answer is that they (the Commissioners) are 'to consider all the facts as between man and man. Their 'object is to get at a rent which in point of fact is fair, and in 'attaining that object to have in view everything which affects 'its fairness as between the parties. Such matters as the wealth 'of the landlord and the poverty of the tenant do not touch the 'fairness of the rent.'¹⁹ As to the question of improvements made under written agreement, 'there is no exception made of 'such improvements,' as there is in the 8th and 9th sections of the Act. 'A clear distinction is drawn between the provision in 'sect. 6 and the provisions in sects. 8 and 9, but no injustice is 'done by this, because the Commissioners are allowed to take into 'consideration how far the tenant has already in substance been 'paid for what he did, . . . and the agreement forms one of the 'circumstances to be kept in view.'²⁰

Dicta of Commission.

In regard to arrears, it has been strenuously argued that an application to the Commission to fix a fair rent and deal with the matter of arrears, made incompetent an action for the recovery of arrears raised before the determination of the Commission and after the passing of the Act, since *non constitit* what amount would turn out to be payable. But the argument was repelled on the ground that the Act did not either expressly or by plain implication deprive the landlord of his common law right to sue for recovery of debt.²¹ The arrears contemplated in the 5th subsection as due, are those which are due at the time when

Action for recovery of arrears not barred by application to Commission.

¹⁸ As to valuation of improvements, see next page.

¹⁹ Opinion delivered at Dornoch, 20th Dec. 1886.

²⁰ The Irish Judges in full Court arrived at the same result in regard to the somewhat different words of the Irish Land Act, 1881, sect. 8 (9), in *Adams v. Dunseath*, 10 L.R. (Ir.) 109;

and see *Holt v. Harberton*, Ir.R. 1 Reg. 82, there criticised.

²¹ *Fraser v. Macdonald*, 1886, 14 R. 181. L. Rutherford Clark agreed that decree should go out, but was not clear how far it could be enforced. The other Judges seem to have thought removing the only ordinary remedy that was incompetent.

the Commission proceeds to consider the application and are such as 'the tenant's circumstances do not enable him to pay voluntarily or the landlord to recover although all his remedies were 'to be in force.' Otherwise the tenant would delay applying to the Commission as long as possible.²²

Common
privileges.

Lastly, the Commission may draw up a scheme regulating the use by crofters on the same estate, of sea-weed, peat bogs, heather, or grass for thatching, and include the charge for these in the fixed rent (sect. 12 *ad fin.*).

3. *Renunciation of Tenancy.*

A crofter shall be entitled upon one year's notice in writing to the landlord to renounce his tenancy as at any term of Whitsunday or Martinmas (sect. 7).²³

4. *Compensation for Improvements.*

To crofters
and cottars.

It has been shown that improvements made by crofters are to be taken into consideration in fixing the fair rent, where the crofters intend to remain on the land. They and cottars are entitled also to compensation for such improvements on quitting. This termination of the relation between the parties may be the result, in the case of a crofter, of a renunciation by him or of a removing; and, in the case of a cottar, of a removing if he pays no rent, or of a renunciation or removing if he pays rent. The improvements must be permanent;²⁴ suitable to the holding; executed or paid for by the crofter (cottar) or his predecessors in the same family;²⁵ not executed in virtue of any specific agreement²⁶ in writing under which the crofter (cottar) was bound to execute such improvements; and not buildings erected in violation of an interdict or other judicial order (sects. 8, 9). The value of an improvement is its value to an incoming tenant, under deduction of the value 'of any assistance or consideration 'which may be proved to have been given by the landlord or his 'predecessors in title,' and 'of any deterioration committed or 'permitted by the tenant within the four years preceding' (sect. 10). The Agricultural Holdings Act, 1883, is saved, 'provided 'that, where any improvements are valued under the said Act 'with a view to compensation to be paid to a crofter, such valuation shall be made, unless the landlord and crofter otherwise 'agree, by the Crofters Commission' (sect. 31). It has been

²² *Per* L. Young, *ibid.*

²³ See next paragraph.

²⁴ See *supra*, p. 514, the definition thereof, and contrast the 'permanent or 'unexhausted' improvements in sect. 6 (1).

²⁵ See *infra*, p. 523.

²⁶ See sect. 5 of the Agricultural Holdings Act, *supra*, p. 245, and *infra*, Appx. No. ii.

pointed out²⁷ that this limited direction and the fact that among permanent improvements are by the schedule²⁸ included such as, in the judgment of the Commission, add to the value of the holding to an incoming tenant, are the only indications in the statute that the Commission has any powers or functions in regard to the fixing of compensation for improvements; and it has been forcibly suggested that they are insufficient to oust the ordinary tribunal, the Sheriff Court.

5. *Enlargement of Holdings.*

Five or more crofters resident on neighbouring holdings,²⁹ if any landlord refuses to let them available land on reasonable terms for enlarging their holdings, may apply to the Commission, setting forth that in their parish or an adjacent one there is available land, that they are willing to take it on lease, and that the landlord or landlords refuse to let (sect. 11). After intimating the application to the landlord or landlords, giving the parties an opportunity of being heard, ascertaining how far the small size of the holdings is due to either party, and making other inquiry, the Commission, on being satisfied of the availability of land, the refusal to let it, the will and ability of the applicants to pay a fair rent for it and to cultivate and stock it, may make an order for a lease of the said land or part of it to the applicants or one or more of them at a fair rent and on just conditions. Or it may admit the applicants to participate with other crofters in common pasture, or confer on them *inter se* rights of common pasturage over available land.

On application by five or more crofters.

Land is not 'available' (1) unless it lies contiguous or near to land already occupied by the applicants and belongs to their landlord or landlords³⁰ [sect. 13 (1)]; (2) if subject to a lease for years entered into before 25th June 1886 for other than sporting purposes, unless consent is obtained [13 (2)]; (3) if it be part of a garden, policy, park, plantation, or wood; of a farm the letting value of which would be materially damaged by the severance, or the rent or value of which does not exceed £100; or of a deer forest, the use of which would be seriously impaired, to the loss of the inhabitants of the district; or (4) if it be arable land or improved pasture in the immediate vicinity of a residence or farm steading, or its assignment would substantially impair the amenity thereof. The value of the land assigned shall not exceed one-third of the value of the farm or other holding from which it is taken if between £100 and £150;

Land not available.

²⁷ Johnstone, Crofters Act, p. 10.

²⁸ *Supra*, p. 514.

²⁹ Defined *supra*, p. 514.

³⁰ Probably *applicando singulis singulis*.

one-half if above £150 and below £300 ; two-thirds if above £300.³¹ And the enlargement is not to raise the value of the holdings to more than £15 each (sect. 13). If land be so assigned out of land let for sporting purposes, the Commission fixes the deduction to be allowed from the rent (sect. 14). The land assigned becomes part of the holdings for all purposes (sect. 15).

Procedure.

In regard to procedure for enlargement, intimation is made to landlords, tenants, persons in occupation of or otherwise interested in the land applied for, including heritable creditors, with notice of the times and places at which parties will be heard. The Commission may visit the locality and get the assistance of assessors or valuers. They may make orders regarding the erection and maintenance of fencing and the expense thereof. They are empowered to decide summarily questions relating to boundaries between holdings and between these and adjoining lands.³²

6. *Succession and Bequest.*

Intestate succession.

It has been seen³³ that the term 'crofter' includes the successors of a person to whom the definition applies, being his heirs or legatees. The heir here referred to is the heir-at-law, subject only to the exceptions that, in the event of the heirs-at-law being heirs-portioners, the eldest succeeds without division (sect. 19), and that certain distant heirs may be displaced, as will be presently shown. The succession of a legatee is elaborately provided for in the 16th section of the statute.³⁴ It permits a crofter to bequeath his right to one person being a member of the same family (*i.e.*, his wife or any person who, failing nearer heirs, would succeed to him in case of intestacy), provided always, that, in the case of any legatee or heir-at-law more distant than wife, son, grandson, brother, or son-in-law, the landlord may, on his own part or on the part of neighbouring crofters, represent that, for the purpose of enlarging their holdings, the holding in question should be added to them, and the sheriff may so determine, subject to compensating the heir or legatee for improvements; and, if the landlord fails to make the addition within six months after that determination, the neighbouring crofters may apply for an order assigning the holding to one or more of them. Intimation to the landlord or his

Bequest.

³¹ The section is here hastily drawn. What if the rent were exactly £300?

³² But this power does not seem to be incidental to enlargements only.

³³ *Supra*, p. 514 (sect. 34).

³⁴ Cf. Agricultural Holdings Act, 1883, sect. 29 (*supra*, p. 150, and *infra*, Appx. No. ii.).

known agent must be made within twenty-one days after the death of the crofter, unless prevented by some unavoidable cause. It imports acceptance by the legatee. Within a month the landlord or his agent may intimate objection to receive the legatee; if he does not, the transfer takes place as at the date of the crofter's death. If objection is taken, the legatee may petition the sheriff for decree declaring him the crofter as from that date, and give the landlord due notice thereof. If the objection is established, the sheriff declares the bequest null and void; if not, he declares in terms of the prayer of the petition; and his decision is final. Pending the proceedings, the legatee is to be in possession unless the sheriff otherwise directs on cause shown. A legatee accepting and not effectually objected to possesses on the same terms and conditions as if he had been heir. If a legatee does not accept or is effectually objected to, the holding descends to the heir in the same manner as if the bequest had not been made.

The mention of 'son-in-law' in the above proviso throws some 'Same family.' doubt on the meaning of the expression 'same family' in the present section and in sections 6 (1), 8, and 9, and suggests a looser construction of the term with regard both to predecessors and to successors than one which would confine it to persons from or to whom intestate succession might operate. It may be argued that the benevolent intention of the statute is to favour persons who in their occupancy have maintained an unbroken household of near kin, or desire still to maintain it. There is nothing in the earlier sections inconsistent with right to compensation for improvements executed by a father-in-law or step-father. It is, however, hard to read the definition in the outset of the present section as inclusive of succession in right of the claimant's wife. Yet that seems to be the only way to make the section consistent with itself, and, if so, other cases of relationship by affinity, to which the same reasoning would apply, may easily be figured.

PART IV.

QUESTIONS WITH THIRD PARTIES.

1. QUESTIONS WITH CREDITORS OF TENANT (Chap. XXIV.).
2. QUESTIONS ARISING OUT OF NEIGHBOURHOOD AND PUBLIC RIGHT (Chap. XXV.).
3. PUBLIC PRIVILEGES AND PUBLIC BURDENS (Chap. XXVI.).

CHAPTER XXIV.

QUESTIONS WITH CREDITORS OF A TENANT.

It seldom happens that creditors of a landlord require to inter- Topic defined.
 vene either singly or through a trustee in bankruptcy between
 their debtor and his tenant; and, if such intervention take place,
 the rules set forth *passim* in the foregoing pages may be found
 a sufficient guide to a determination of any questions that may
 arise.¹ It will suffice, therefore, to confine attention here to
 questions arising between the other creditors of a tenant—*inter se*
 or with his landlord. Most of these questions have come up in
 connection with the bankruptcy of the tenant; so that they are
 on one side complicated, on another side simplified, by the subsist-
 ence of a trust created either by a private trust-disposition for
 behoof of creditors, or by proceedings in bankruptcy sequestration,
 or in *cessio bonorum*.

I. EFFECT OF TENANT'S BANKRUPTCY ON THE LEASE.

On earlier pages of this treatise the effect of conveyances to
 creditors, diligence, and bankruptcy on the power of a proprietor
 to grant leases,² and the operation of a clause of irritancy in the
 event of a tenant's bankruptcy or insolvency,³ have been fully
 explained. The effect of diligence against a tenant and of his
 bankruptcy—where no such clause exists—is the subject of the
 present chapter. The existence of well-established recent treatises
 on the subject of bankruptcy makes it superfluous to enter into
 much detail.⁴

¹ *E.g.*, Davidson *v.* Boyd, 1867, 7 M.
 77; Harvie *v.* Haldane, 1833, 11 S.
 872; Harkness *v.* Rattray, 1878, 16
 Sc.L.R. 117; and see a curious case,
 where compensation money annually
 due by the landlord for land taken
 greatly exceeded the rent, and the
 tenant was held to have no preference

for the balance—Bertram *v.* Guild, 1880,
 7 R. 1122.

² *Supra*, p. 44.

³ *Supra*, p. 467.

⁴ Goudy on Bankruptcy, esp. pp. 256,
 280, 356, 450; Murdoch, esp. pp. 41, 67,
 77, 276, 282.

Bankruptcy
not termina-
tion of a lease.

It has been already remarked⁵ that the bankruptcy of a lessee does not *ipso facto* and without stipulation to that effect, put an end to a lease. The bankrupt may continue in possession if he pay the rent and perform the other prestations;⁶ and the landlord can only resort to the ordinary means of bringing the lease to a premature conclusion,⁷ which were described in a former chapter. The only exception at common law arises where the sole lessee is a company, for by becoming bankrupt it is dissolved, and the lessee no longer exists.⁸ But there is a strong distinction between the liability for arrears and for rents current at the date of the bankruptcy on the one hand, and the liability for rents which begin to be current thereafter. For the former the bankrupt cannot be sued, since the only remedy is by claiming in his sequestration; for the latter he may.⁹

Assignment
of lease in
bankruptcy.

As has been already seen,¹⁰ the tenant's part of a lease may be either transmissible by way of assignment or of sublease, or both, or intransmissible in either or both of these ways; and the bar to free disposal, if it exists, may be set up by force either of the common law or of agreement. Whatever be the mode in which a bankrupt tenant dispossesses himself of his estate, an assignment of his leasehold rights, effectual or ineffectual, is involved in the transfer. And the principal question is whether, and if so to what effect, such an assignment actually results.

Voluntary
trust-deed.

Prior to the Bankruptcy Act of 1856,¹¹ a voluntary trust-deed for creditors was the only mode of making a lease available to the general body of creditors of a farming tenant who was not also a trader,¹² and it is still a competent mode in all cases. Similar in effect (though couched in a short prescribed form¹³) is the disposition *omnium bonorum* in favour of the trustee in a *cessio*, which is necessary to vest in him the heritable property of the bankrupt. In both cases, there being no statutory force ascribed to the words of conveyance, an ordinary assignment only is inferred, *valeat quantum*, of any leases which the debtor may happen to hold. The vesting clause in the Bankruptcy statute, where the estates have been sequestrated, is in strong contrast.

Disposition
omnium bonorum.

Vesting in
sequestration.

⁵ *Supra*, p. 468.

⁶ 1 B.C. 80; *Crawford v. Maxwell*, 1758, M. 15307, *infra*, p. 530; and see *Dobie v. M. of Lothian*, 1864, 2 M. 788, 800; *Burns v. Martin*, 1885, 12 R. 1343, rev. 14th Feb. 1887.

⁷ And the bankrupt is not required to find caution in order to defend—*Taylor v. Fairlie's Trs.*, 1830, 8 S. 666, rev. 6 W. and S. 301.

⁸ 1 B.C. 82, and case of *Campbell v. Calder Iron Co.*, 1805, there; *Walker v. M'Knight*, 1886, 13 R. 599.

⁹ *Fraser v. Robertson*, 1881, 8 R. 347.

¹⁰ *Supra*, p. 157.

¹¹ 19 & 20 Vict. c. 79, sect. 2.

¹² See 54 Geo. III. c. 137, sect. 15; 2 & 3 Vict. c. 41, sect. 5.

¹³ A.S., 22nd Dec. 1882, Sched. A; Adam's A.SS. p. 135.

It enacts¹⁴ that—

the act and warrant of confirmation in favour of the trustee shall *ipso jure* transfer to and vest in him or any succeeding trustee for behoof of the creditors absolutely and irredeemably as at the date of the sequestration, with all right, title, and interest, the whole property of the debtor to the effect following. . . . The whole heritable estate belonging to the bankrupt in *Scotland* to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of the sequestration, and as if a poinding of the ground had then been executed, subject always to such preferable securities as existed at the date of the sequestration, and are not null and reducible, and the creditor's right to poind the ground as hereinafter provided.

The tenant's part of a lease is 'heritable estate belonging to' him; and the vesting is here *inter alia* declared to be equivalent to a decree of adjudication for debt.

The only practical distinction, however, between the vesting in a private trustee for creditors or a trustee in a *cessio* on the one hand, and this vesting under the sequestration statute on the other, seems to be, that the former does not, while the latter does, carry to the trustee right to such leases (*e.g.*, agricultural tacks) as are unassignable only *presumptione juris* and not by express agreement, and accordingly are adjudgeable.¹⁵ What immediately follows may, therefore, be taken as applicable to all cases of divestiture for behoof of creditors.

1. *Leases excluding Assignees and Subtenants.*

It has been already shown that an exclusion of assignees and subtenants imports nothing more than a veto on the part of the landlord against assigning and subletting—a veto which he is entitled to forego if he chooses.

(a) *Where the Landlord enforces the Clause.*

Where the landlord insists on enforcing the exclusion, and declines to receive the trustee¹⁶ as tenant, the only mode of making the lease available for the payment of debt is for the trustee to arrange with the bankrupt to carry on for behoof of his creditors. The tenant's consent must be obtained. Thus an agreement may be made with him to supersede diligence, give him the use of his stocking, and make him an allowance for his

Carries adjudgeable leases.

Landlord's veto.

Tenant to carry on for behoof of creditors.

¹⁴ 19 & 20 Vict. c. 79, sect. 102.

¹⁵ *Supra*, pp. 48, 162.

¹⁶ For the sake of convenience the assignee or assignees for creditors are

spoken of in the sequel as 'trustee,' whatever be the origin of the trust or the number of the trustees.

maintenance and services, the profits going to the liquidation of his debt; and such an arrangement will be supported on the ground that it is 'material justice' to allow a tenant to possess when assisted by his creditors.¹⁷ Moreover, on the tenant's death his heir may enter into a similar arrangement.¹⁸ Actual possession by the tenant himself is indispensable towards this mode of dealing. Transactions involving surrender of possession by him and devolution of the management on another person are invalid, as being nothing better than covert assignations.¹⁹ But mere non-residence is not enough to infer his renunciation of possession. To have that effect, it must be combined with some more decisive circumstance, such as his departure beyond the realm, or taking up another business, or abandonment of all concern in the matter.²⁰ If, on the other hand, the tenant deserts the subjects, and third parties enter, they are not liable to account to the trustee for their intromissions.²¹

Subletting
open.

If under a lease subletting is admissible and assignation is not, the purpose of the partial veto is easily defeated by a sublease (to the trustee or any other person) of the whole subjects let—a transfer which is in effect equivalent to an assignation, and may be demanded from the bankrupt tenant by his trustee.²² Creditors can, on the chance of no objection being taken by the landlord, demand an assignation or sublease in their favour, though there be a clause excluding both, provided only that the clause is not fenced with an irritancy.²³

Irritancy.

(b) *Where the Landlord waives Objection.*

Transmission
on terms.

If in the exercise of his discretion in the management of his property the landlord does not object to the trustee entering into possession as tenant, the result is the same as if there had been no exclusion, with this exception, that the landlord is in a position to make terms with the trustee. It is true that in a case where

¹⁷ *Durham v. Livingston*, 1774, in 1 B.C. 80, note; *Dobie v. M. of Lothian*, 1864, 2 M. 788. See *per* L. Deas at p. 800; *Lyon v. Irvine*, 1874, 1 R. 512.

¹⁸ *Laird v. Grindlay*, 1791, M. 1529, Bell, Fol. Ca. 296, 1 B.C. 80; *E. Gallo-way v. M'Hutcheon*, 1807, 5 Pat. 169, 1 B.C. 80.

¹⁹ *Durham v. Henderson*, 1773, M. 15283, 1 B.C. 80, and note at 5 Pat. 175; *Monro v. Miller*, 11th Dec. 1811, F.C. 384; *Watson v. Douglas*, 13th Dec. 1811, F.C. 412; *Lyon v. Irvine*, *supra*,¹⁷.

²⁰ Cf. with cases in last note *E. Dal-*

housie v. Wilson, 1802, M. 15311; *Sydsarf v. Todd*, 8th March 1814, F.C. 583; and see clause enforcing residence in *Young's Trs. v. Anderson*, 1809, Hume 843.

²¹ *Roberts v. Wallace*, 1843, 5 D. 760.

²² *Crawford v. Maxwell*, 1758, M. 15307 (to trustee), and case of *Ogilvie v. Fullarton's Trs.* there; 1 B.C. 77, 79, and case of *Niven v. Macfarlane* there. But if the tenant is under a removing, there is nothing to sublet. *E. Aboyne v. Grant*, 1794, Bell, Fol. Ca. 43.

²³ 1 B.C. 79, and *Niven*, *supra*,²².

the lease excluded assignees, whether legal or voluntary, and all subtenants without the special consent and approbation of the proprietor, and the tenant's trustee entered into a transaction with a third party granting him the right to crop the farm for the year current at the date of the bankruptcy, a very high authority was of opinion that the lease did not pass by the confirmation of the trustee subject to the landlord's right and objection, but that on the contrary a lease which expressly excludes assignees cannot pass by legal assignation any more than by voluntary assignation without the landlord's consent.²⁴ But this view was negatived in a later case, in which the whole Court was consulted. A tenant, under a lease excluding assignees and subtenants without the consent of the proprietor, was sequestered. The landlord gave his consent to the judicial assignation in favour of the trustee on condition of his renouncing the lease in terms of an arrangement by which the landlord was to pay a certain sum for the stock and lease. The transaction was approved by the Accountant in Bankruptcy and by the creditors, but was challenged by the tenant on the grounds that the lease was not carried by the sequestration; that a conditional consent to the assignation to the trustee was ineffectual; and that a private sale of the estate under circumstances which implied that there could be but a single offer, was not a compliance with the provisions of the Bankrupt Act. The decision was that the exclusion of assignees only operated in favour of the landlord; that it did not prevent the lease from vesting in the trustee, provided the landlord did not object; that the conditional assent was effectual; and that there was no infringement of the Act.²⁵ The distinction between the two views is perhaps little more than verbal; it is the distinction between a suspensive and a resolute condition—the latter being preferred.

2. *Where there is no Operative Exclusion.*

Where a lease vests in a trustee in bankruptcy either on account of there being nothing to exclude him at law or by compact, or because a power of exclusion has been waived by the landlord, he has in the first place to consider (provided there be no condition, as in the foregoing case, binding him to

Election to
take up or
abandon.

²⁴ *Fleming v. Macdonald*, 1860, 22 D. 1025, *per* L.J.-C. (now L.P.) Inglis at p. 1030. The decision of the case was the perfectly sound one—that the trustee could not convey a higher right than had been in the bankrupt, who was bound by estate regulations,

²⁵ *Dobie v. Ms. Lothian*, 1864, 2 M. 788. See case where allegations of collusion between the trustee and the landlord came too late fourteen years after the trustee's discharge—*Robertson v. Scott*, 1834, 12 S. 875.

Personal
liability of
trustee.

surrender the lease) whether he should take it up or not. If he does he makes himself personally liable (like other adjudgers²⁶ and intromitters without benefit of inventory) to pay the rent due, whether in arrear²⁷ or for the future,²⁸ and to fulfil all the prestations of the lease, past, present, or to come.²⁹ The liability is not confined to the extent of the bankrupt's funds in his hands.³⁰ The *ratio* is that if a trustee remains in possession longer than is necessary to ascertain what is the value of the asset, he renders himself liable in all the covenants of the lease.³¹ It is no answer that he adopted the lease in excusable ignorance of the existence of arrears, provided nothing has been done by or on behalf of the landlord to stifle inquiry or induce a belief of immunity. Nor is it enough for him to prove that bills had been granted for the arrears, if these bills have not been paid.³² And the landlord's claim is not merely to be ranked preferably on the bankrupt estate; it is a personal claim against the trustee and the creditors on whose instruction, express or implied, he acted, of the same sort as is created by an ordinary assignation.³³ But the adoption need not be absolute. A case of conditional adoption has been already mentioned.³⁴ A condition that there shall be no personal liability for arrears of rent has also been spelt out of the actings of the landlord.³⁵ It is also competent to limit the adoption in time—as, for example, to the current year and crop and subject to the landlord's preferential right to the rent for the same.³⁶

Fact of adop-
tion.

It is always a question of circumstances whether a trustee has adopted a lease—that being an act of extraordinary administration—or, in dealing with it, has only proceeded in the ordinary course 'to manage, realise, and recover' this part of the estate of the bankrupt and to 'convert the same into money,'³⁷ and to do so in the mode which is best for all concerned, as, for example, by tilling the land, sowing or reaping a crop, keeping mining or manufacturing machinery going, making trial of the concern or working out short contracts; and thereby throwing liability

²⁶ *Lamington v. Oswald*, 1688, M. 15277, makes an untenable distinction.

²⁷ *Ross v. Monteith*, 1786, M. 15290.

²⁸ *Nisbet's Tr.*, 1802, M. 15268; *Laing v. Duff*, 1845, 7 D. 556, 17 Sc. Jur. 272.

²⁹ *Cuthill v. Jeffrey*, 21st Nov. 1818, F.C. 578.

³⁰ *Fairlie v. Nelson*, 1821, 1 S. 222 (N.E. 211).

³¹ *Kirkland v. Wilson & Son's Tr.*,

1831, 9 S. 596, aff. 6 W. and S. 340.

³² *Dundas v. Morrison*, 1857, 20 D. 225.

³³ *Ibid.*; *Kirkland v. Cadell*, 1838, 16 S. 860.

³⁴ *Dobie v. Ms. Lothian*, *supra*, ²⁵.

³⁵ *M'Gregor v. Hunter*, 1850, 13 D. 90.

³⁶ *Munro v. Fraser*, 1858, 21 D. 103.

³⁷ 19 & 20 Vict. c. 79, sect. 82.

nowhere except on the sequestered estate.³⁸ If the subjects be retained for a considerable length of time and under circumstances which are incapable of any other construction than adoption, the lease will be held to have been taken up.³⁹ On the other hand, a trustee may (it is true) render himself liable in damages, but he will not be held to have adopted a lease and made himself responsible for the rent, by retaining possession pending the determination (adversely to him, as it turns out) of a question of property in important fixtures, and by refusing to concur with the landlord in arranging for letting the subjects to some third party; for so long as he made no use of the subjects himself there was no possession in the proper sense of the term.⁴⁰ And, where trustees for creditors, with the acquiescence of the landlord, entered into the management of a farm prior to sequestration, their intromissions, being merely tentative and liable to interruption at any moment, were held not to be such as to render them personally liable.⁴¹

If instead of adopting, the trustee abandons, the lease,⁴² and the tenant himself refuses to remain, and loss accrues thereby to the landlord, the latter is entitled to claim and rank for damages, the measure of damage being, as a rule, the difference between the old rent and the new rent or annual value for the number of years the lease has still to run, subject to discount for immediate payment of the whole.⁴³ If there be an irritancy in the event of bankruptcy, it would probably be held that the landlord would only be entitled to damages if he were willing, in spite of the irritancy, to let the tenant or his trustee continue possession, and not if he took advantage of the irritancy without giving them the alternative.⁴⁴

Damages for abandonment.

II. COMPETITION AMONG TENANT'S CREDITORS.

1. *Landlord's Hypothec.*

Except in so far as a landlord has a preference in virtue of his hypothec,⁴⁵ or may have a right to carry off steelbow goods⁴⁶ as his property and not the tenant's, his position in a competition is

³⁸ See *Kirkland v. Cadell*, 1838, 16 S. 860, esp. 881.

³⁹ *Kirkland v. Wilson & Son's Tr.*, *supra*, 31.

⁴⁰ *Stead v. Cox*, 1835, 13 S. 280; cf. *Richardson v. Scott*, 1835, 13 S. 972 (irritancy through bankruptcy).

⁴¹ *Dundas v. Hood*, 1853, 15 D. 752.

⁴² The rule is general with regard to all continuing onerous contracts;—see

Goudy, p. 279. See the converse case—non-adoption of an onerous lease by the landlord's trustee—*Bertram v. Guild*, 1880, 7 R. 1122.

⁴³ 1 B.C. 80; 2 B.C. 413.

⁴⁴ See *Kinloch v. Mansfield*, 1836, 14 S. 905; *Walker's Trs. v. Manson*, 1886, 13 R. 1198.

⁴⁵ *Supra*, p. 322 *seq.*

⁴⁶ As to which question see *supra*, 256.

in no way different from that of an ordinary creditor.⁴⁷ The landlord's hypothec is not affected by the Bankruptcy Act.⁴⁸ The two processes of sequestration need not interfere with each other. The landlord does not give up his preference or his separate proceedings by claiming in the bankruptcy process;⁴⁹ nor by allowing another creditor to poind the tenant's effects on condition of receiving payment out of the proceeds.⁵⁰ And the most convenient course usually is for the trustee to realise the hypothecated goods under obligation to pay or credit to the landlord the proceeds so far as lawfully secured by the hypothec.⁵¹

2. *Poin ding.*

Poin ding.

Without entering into the general law of ordinary poin ding,⁵² it is right to refer in this place to certain rules which are special to the occupiers of land and their creditors. They relate to growing corns and plough goods.

(a) *Growing Corns.*

Of growing corns.

Growing corns, though in one sense *partes soli*, are, after they have reached a certain stage of growth regarded as moveable and therefore poindable.⁵³ A poin ding in December of wheat just braided and of new grass sown for a crop next season is premature.⁵⁴ The same may be said of a poin ding of growing wheat in January.⁵⁵ And the only rule which can be laid down is that the corn must be ripe or nearly ripe.⁵⁶ The diligence is, however, incomplete till severance has taken place, so that it is annulled by the death of the debtor in the interval.⁵⁷ Where a tenant was removed through the operation of a conventional irritancy, it was held that a recently sown crop of wheat belonged to the landlord, and that a poin ding of it by a creditor of the tenant was not an effectual mode of attaching the tenant's claim to be recompensed for seed and labour.⁵⁸

⁴⁷ Illustrations of the doctrine of illegal preferences within sixty days before bankruptcy are to be found in *Macfarlane v. Greig*, 1831, 9 S. 529; *Wright v. Walker*, 1839, 1 D. 641; *Morrison v. Carron Co.*, 1854, 16 D. 1125.

⁴⁸ *Salvo* in 19 & 20 Vict. c. 79, sect. 119. See as cases under similar clause in the older Acts—*Dickson v. Watson*, 1779, M. 1246; *Baird v. Brown*, 1772, M. 6271; *Anderson v. Kerr*, 1780, M. 6272, Hailes 857; *Euchan v. Nisbet*, 1781, M. 6272.

⁴⁹ *Wilson v. Holme*, 15th Feb. 1828, F.C. 577.

⁵⁰ *Russel v. Cochrane*, 1831, 9 S. 304.

⁵¹ *Davidson v. Falconer*, 1826, 5 S. 131, (N.E. 121), shows the practice under the old Acts.

⁵² See as to poin ding after sequestration—*Thom v. Jack*, 1834, 12 S. 612.

⁵³ *Ersk.* 3.6.22; *Ballantyne v. Watsons*, 1709, M. 10526; *Ferguson v. Dick*, 1734, *Mowbray v. Drummond*, 1736; and *Kirkland v. Miller*, 1741; *Elch. Poin ding*, Nos. 1, 5, and 7.

⁵⁴ *Elder v. Allen*, 1833, 11 S. 902.

⁵⁵ *Dun v. Johnston*, 1818, Hume 451.

⁵⁶ *Elder v. Allen*, *supra*, ⁵⁴.

⁵⁷ *E. Morton v. Somerville*, 1765, M. 6197.

⁵⁸ *Dun v. Johnston*, *supra*, ⁵⁵.

(b) Plough Goods.

The statute 1503, c. 98, prohibits all officers of the law from ^{Of plough goods.} poinding or distraining horses, oxen, and other goods pertaining to the plough, and that labour the ground, during the time of such labouring, where there are other goods or land to be appraised [adjudged] or poinded. The enactment applies to work-horses ⁵⁹ and cattle, ⁶⁰ used for ploughing, though not actually yoked at the time, ⁶¹ or even within the year. ⁶² The labouring time is that of the farm in question, not of the district; so that a poinding on the evening of the last day of actual work, ⁶³ or at a season when the debtor had not begun to plough, though some of his neighbours had, ⁶⁴ was held good; while a poinding at a season (middle of June) when the neighbours had long ceased labouring, ⁶⁵ but the debtor was late with his work, was found to be incompetent. ⁶⁶ Actual use in the plough before or after the usual time of labouring does not give the privilege. ⁶⁷ And only use for the plough confers it. ⁶⁸

The prohibition fails if there be proof that there were not ^{Where other goods insufficient.} other goods on the ground sufficient to meet the rent and the poinder's debt; ⁶⁹ but the debtor is not bound to point out the other poindable goods—it is enough that such exist. ⁷⁰ It appears that the other exception—if appraisable lands belonged to the tenant—soon fell into desuetude. ⁷¹ With this exception the statute is still in observance; and the execution should always bear, under sanction of nullity, that search had been made in vain for sufficient poindable goods to which the privilege did not apply. ⁷²

3. Poinding of the Ground. ⁷³

A superior or heritable creditor in suing an action of poinding ^{Poinding of the ground.} of the ground conjoins with his vassal or debtor the tenants and possessors of the ground (if such there be), 'but, in so far as relates

⁵⁹ Gibson v. L. Corsbie, 1630, M. 10512.

⁶⁰ Drumkilbo Tenant v. The Laird, 1629, *ibid*.

⁶¹ Gibson, *supra*, ⁵⁹.

⁶² A. v. B., 1681, 3 B.S. 402.

⁶³ Watson v. Reid, 1628, M. 10510.

⁶⁴ Irvine v. Aberdeen Coll., 1633, M. 10519.

⁶⁵ Arnot v. Greig, 1712, M. 10527 (there were also other poindable goods. The denial of the privilege here to ploughing for lea seems devoid of principle and authority).

⁶⁶ These cases overrule Wood v.

Stewart, 1678, M. 10516.

⁶⁷ A. v. Duncan, 1617, 2 Fol. Dict. 94; Gullan v. Dunmuir, 1627, M. 10508.

⁶⁸ Turner v. Blackadder, 1558, M. 10505 (carting coals).

⁶⁹ Wemyss v. Goodsire, 1634, M. 10520.

⁷⁰ Gibson, *supra*, ⁵⁹; but see Lawson v. Brown, 1703, M. 10524.

⁷¹ Turner v. Scott, 1692, M. 10523.

⁷² L. Adv. v. Forgan, 20th Feb. 1811, F.C. Appx. p. 1.

⁷³ As to maills and duties see *supra*, p. 319.

‘ to the said tenants, to the amount of the rent only, which may
 ‘ be due and payable by them respectively at the time or from
 ‘ time to time for each of their respective possessions of the said
 ‘ lands and others or parts thereof, the terms of payment of said
 ‘ rents being first come and bygone.’⁷⁴ For in that sense is
 construed the prohibition of the old Act 1469, c. 36, against
 ‘ distraining for the lordes’ debtes further then his termes mailles
 ‘ extendis to, . . . and gif the creditour takis the termes mail
 ‘ be virtue of the brieve of distresse it sall not be leifful to the
 ‘ lorde to tak it againe.’⁷⁵ Not only the last due rent for a year,
 and, as they come due, future rents, but all arrears may thus be
 attached.⁷⁶ The diligence does not affect the goods of third
 parties which may happen to be on the land or other subjects
 let.⁷⁷ The decree passes against the tenants in general terms,
 leaving the pursuer to work out his remedy at his own risk.⁷⁸
 If the tenants do not appear, decree in absence passes against
 them though the landlord defends.⁷⁹ Mere citation of tenants
 in the action does not operate as an intimation that the rents
 have been assigned, so as to interpel them from paying future
 rents to their landlord;⁸⁰ but if the poinding has been put in
 execution against them, and if it *ex facie* proceeds on an express
 assignation of rents, it is equivalent to intimation thereof.⁸¹ If
 certain tenants have been omitted, or tenants cited have assigned
 their rights, the proper course is to raise a fresh summons.⁸²

4. Other Diligence.

No specialties arise in the use of other forms of diligence and
 in competition between different forms thereof, out of the nature
 of the contract of lease.⁸³

⁷⁴ 3 Jur. Styles (3rd ed.) 203, 377; St. 4.23.10, 14; Mack. 2.8.14; Bankt. 2.5.7; Ersk. 2.8.33; 4.1.12; Ross, Lect. ii. 392; 1 B.C. 683; B. Pr. 914, 922, 2285; Mackay, Practice, ii. 313; Thurstone’s Creds., 1676, 3 B.S. 61.

⁷⁵ Limitation enforced, Ly. Pitfoddles v. Pitfoddles, 1674, M. 10548; Fotheringham v. Balmerino, 1676, M. 10549, overruling Ly. Ednam v. Heir, 1628, M. 8129, 10545, 1 B.S. 265, 376.

⁷⁶ Ersk. *supra*, ⁷⁴.

⁷⁷ Collet v. Balmerino, 1679, M. 10550, overruling Ly. Ednam, *supra*, ⁷⁵; and Paterson v. Adamson, 1622, M. 10543. But see the rules regarding hypothec, *supra*, p. 343.

⁷⁸ Pitfoddles, *supra*, ⁷⁵.

⁷⁹ Buchan v. Scott, 1829, 7 S. 296.

⁸⁰ Royal Bank v. Dixon, 1868, 6 M. 995—the poinding was not carried out.

⁸¹ Lang v. Hislop, 1854, 16 D. 908. Both elements were present; but probably the latter would be sufficient; see last case.

⁸² But see the older practice, Forrester v. A., 1612, M. 10543; Watson v. Reid, 1628, M. 10510, 10545; Adamson v. Balmerino, 1662, M. 3246, 10547; 1 B.S. 376.

⁸³ Mr. Hunter refers to cases of arrestment in M. 761; 7 S. 72; 9 S. 754. As to adjudication, see *supra*, pp. 46, 48.

CHAPTER XXV.

QUESTIONS ARISING OUT OF NEIGHBOURHOOD AND
PUBLIC RIGHT.

THE reader must go elsewhere for an exposition of those rights and duties which may be compendiously described as arising out of the circumstance that the parties with whom a tenant is brought into contact are neighbours or persons asserting a public right. The most important of the problems of private law, in which the public have an interest, or in which the cardinal element is neighbourhood—not necessarily contiguity—pertain to the law of ownership. But the temporary interest of a tenant is sufficient to entitle him to a remedy where it is injuriously affected or threatened by the acts of a third party, and the longer his term the greater his interest. On the other hand, it is sufficient to expose him to attack, if, in the exercise of his right of possession, he infringes the rights of others. In one sense this right and this liability are derivative, for they are acquired by that temporary and (it may be) partial transfer of the rights and duties of an owner, which is of the essence of a lease. In another sense, they are independent in as much as a tenant is free to pass from the full assertion of his own rights on the one hand, or on the other hand to respect or infringe the rights of others.

Shortly stated, the questions here contemplated may be arranged under these heads—*culpa*, nuisance, servitude, and public right. The division is convenient, though not ideally perfect. By *culpa*, fault or negligence is meant, specific fault on the part of a tenant towards a party other than his landlord, in doing or leaving undone some act, which act or omission, but for the fault, could not have been effectually complained of at law. By nuisance is meant an infringement of that natural right, *in suo*, to comfortable possession to which each owner or possessor is

Interest of
landlord and
tenant respec-
tively.

Culpa.

Nuisance.

Servitude.

Public right.

entitled over against a neighbouring owner or possessor. By servitude is meant a derivative or acquired right (or obligation) *in alieno* competent or incumbent between owners only, and through them to or on their tenants in certain cases. The sort of public right which is here contemplated is that in virtue of which members of the public are entitled to enjoy certain definite uses of heritable property in private ownership and possession. Though there is a rich literature dealing with all these matters as part of the law of property, there is a singular dearth of authority in Scotch law regarding the part which a tenant may choose or be forced to take in questions arising out of them. Some assistance may, however, be derived from English and American jurisprudence. It may be necessary here and there in what follows to point out distinctions of principle on the lines of the above division of the subject; but the most convenient mode of expounding the rules applicable to the questions with third parties now to be treated seems to be to look to the instance and deal (1) with actions brought by a tenant (with or without his landlord's concurrence) against third parties, and (2) with actions brought by third parties against a tenant alone or in conjunction with his landlord. Under the latter head will be treated cases between tenants of different landlords, and actions of relief between landlord and tenant, where either has had decree given against him. The third possible sort of case is (3) that of actions between tenants of the same landlord.

I. ACTION BY TENANT AGAINST THIRD PARTIES.

Title to sue
depends on
interest.

The title of a tenant to sue a neighbour in respect of actual or threatened injury caused through the fault of the latter, or through nuisance, or infringement of an alleged servitude, or to prevent a member of the public from trespassing, depends solely on the amount of his interest in the subjects let to him. It is necessary to distinguish between transitory and continuous injuries; between cases in which the act complained of (such as a trespass or an act or acts of nuisance which can be at once abated) affects the possession only, and cases in which the injury extends so far as to make the subjects unlettable or materially to affect their letting value, or impairs their substance, or takes place in the assertion of an adverse private or public right. In the case of transitory injuries involving no assertion of adverse right, the tenant or occupier has the only title to sue, no injury having been done or threatened to the landlord's interest or reversion. Consequently, an act which would otherwise be a trespass is

Transitory
acts.

secured against being impugned by a landlord if it was done with the tenant's permission.¹

In the case of more permanent injuries there has never been any doubt of an occupying tenant's title to sue for declarator, damages, interdict, removing, or restitution,² in so far as his interest extends³ or otherwise to protect his holding.⁴ Thus a tenant may at his own hand vindicate his right to set up swing-gates across a public or servitude footpath in the course of fencing his farm,⁵ or his right to exercise servitudes let to him along with the corporeal subjects in his lease⁶ so far as thus acquired by him⁷ and no further.⁸ The Court has gone so far as to sustain a tenant's title to sue, though the sole question was one of ownership, raised, however, in the form of a declarator of right to act on a lease. A proprietor leased out minerals in certain lands, which had been feued out by his predecessors in title, so far as he had right to them. The tenants brought a declarator against him and the feuars that they had the sole and exclusive right during the currency of their lease to work the mineral in and under the lands so feued out. The lessor did not defend, but certain of the feuars appeared in support of their exclusive right to the minerals under their feus. Their titles were produced, and after argument satisfied the Court that they were right in their contention. The judgment was absolvitor, since the objection to the title to sue could only be dealt with after consideration of the merits, and not dismissal; and this decision seems to establish the doctrine that a tenant is entitled at his own hand to vindicate his temporary right, and that in considering his claim the Court will not inquire too narrowly whether a question of ownership is or is not involved; whether the action is declaratory or

Permanent injuries.

¹ *Stewart v. Stephen*, 1877, 4 R. 873; see *Winans v. Macrae*, 1885, 12 R. 1051 (pet lamb case); and for the effect of termination of the tenancy see *Brown v. Nottley*, 3 Exch. 219, and cases there; and of a lease before entry, *Wheeler v. Montefiore*, 2 Q.B. 133.

² The actions (springing from possession) of ejection and intrusion are superseded by modern forms, and action of abstraction of multures is nearly obsolete along with the multures themselves. See *Hunter ii.* 136, *seqq.* for the old law.

³ Of modern cases, see *Hamilton v. Tennant & Co.*, 1839, 1 D. 502 (smoke); *Chalmers v. Dixon*, 1876, 3 R. 461 (nuisance from burning bing); *Barclay v.*

G.N. Sc. Ry., 1882, 10 R. 144 (insufficient level crossing, acquiesced in).

⁴ See recent case of herding cattle, *M'Arthur v. Jones*, 1878, 6 R. 41; and see *Robertson v. Wright*, 1885, 13 R. 174.

⁵ *Sutherland v. Thomson*, 1876, 3 R. 485; *Wood v. Robertson*, 9th March 1809, F.C. 241.

⁶ B. Pr. 1224; *Knockdolian v. Parthick Tenants*, 1583, M. 14540; *Weir v. Glenny*, 1832, 10 S. 290, rev. 7 W. and S. 244.

⁷ *Carstairs v. Brown*, 1829, 7 S. 607.

⁸ *Stewart v. Caithness*; *Stewart v. Smart*, 1788, Hume 731; *E. Wemyss v. Hope's Trs.*, 7th Feb. 1809, F.C. 161.

only possessory ; and what may be the effect of the judgment as *res judicata*.⁹ There is also no doubt that landlord and tenant may in such cases as involve the rights and interests of both sue in the same action. Thus where a petition for interdict was the form of action, it was held competent for the proprietor of an estate to join with a tenant on it in proceeding against the working of coal and the committing of other trespasses on the estate, and in particular on the tenant's farm ; and further competent in the same petition to complain of breaches of former interdicts obtained partly by the landlord and partly by the tenant, in respect they to a certain extent had a common interest, and that the acts of the respondents formed a continued and connected series of depredations.¹⁰ The joinder of all persons who have an interest, whether immediate or in reversion, is for the advantage of all parties, especially because a judgment so obtained is of greater value as *res judicata* ;¹¹ and it is invariably attempted in practice.

Injuries affecting landlord's interest.

But difficulties have frequently arisen across the Border on the question whether in certain circumstances the landlord has any interest or title to sue,—whether, in other words, his reversion is affected by the matter he complains of. If permanent harm has been done or threatened to the subjects let (as where a house is cracked or rent through subsidence of its site,¹² is structurally injured by flooding,¹³ or its doors and windows are partly blocked by raising the pavement to a higher level than before ;¹⁴ or if encroachments are made by a neighbour beyond boundary),¹⁵ the landlord has a good title to sue for damages,¹⁶—the amount to be awarded being such as shall be thought by the jury sufficient to bring about an abatement of the nuisance¹⁷—or to take other proceedings. He has also an interest and title to sue if the injury in question, though transitory, is dealt to him in assertion of a right adverse to his own, or operates in denial of his right.¹⁸ And the interest is sufficiently made out if it be shown

⁹ Baird & Co. v. Kilsyth Feuars, 1878, 6 R. 116.

¹⁰ Jolly v. Brown, 1828, 6 S. 872.

¹¹ See Young v. Cunningham, 1830, 8 S. 959 ; and Baird & Co., *supra*, 9 ; where the proper course would have been to conjoin the lessor with the lessees as a pursuer.

¹² Raine v. Alderson, 4 Bing. N.C. 702 ; Bonomi v. Backhouse, 9 H.L.C. 503.

¹³ Bell v. Twentyman, 1 Q.B. 766.

¹⁴ Leader v. Moxon, 3 Wils. 461.

¹⁵ Tucker v. Newman, 11 A. and E. 40 (a case to go to a jury).

¹⁶ Shadwell v. Hutchinson, 2 B. and Ad. 97 ; Thomson v. Gibson, 7 M. and W. 456.

¹⁷ Battishill v. Reed, 18 C.B. 696.

¹⁸ Jackson v. Pesked, 1 M. and S. 234 ; Hopwood v. Schofield, 2 Moo. and R. 34 ; Kidgill v. Moor, 9 C.B. 364. The view taken in Baxter v. Taylor, 4 B. and Ad. 72, that a claim of right by a third party

that the things complained of *may* (not *must*) operate injuriously to the reversion.¹⁹

But if no denial of right is involved and if the injury be merely to the possession—by noise, smoke, or vibration from machinery on neighbouring ground,—the landlord has no title to object, so long as his possession is suspended by the lease.²⁰ Thus though a landlord may object to the digging of pits in his soil his tenant alone can object to third parties trespassing on the subjects.²¹ It seems to be fixed law in England²² (though the contrary seems to be the case in parts of America²³) that if the injury be transitory only, the landlord has no remedy even though he can show that it lost him his tenant, or has lowered the letting value of his premises, or has made them unlettable. It may be conjectured that the Scotch Courts would not allow themselves to be bound or guided by any such rule.

Injuries to possession only.

II. ACTION BY THIRD PARTIES AGAINST LANDLORD AND TENANT.

Where the act or omission of which a third party complains, or the point he desires to raise, clearly involves possession alone without raising questions permanently affecting the subjects let, his only competent course is to call the tenant alone as defender.²⁴ On the other hand, if the question raised be purely one of heritable title—a competition about ownership—the tenant has no interest in the issue and the owner alone should be called. But between these extremes lies a multitude of cases in which there may be grave doubt as to the immediate or ultimate liability of landlord and tenant, or in which the pursuer concludes for a decree which would affect the interests of both; and then the proper course is to call both. If he does not, and if he calls the tenant only, he runs the risk of attacking the wrong party; or the decree he obtains must be limited so as not to affect that interest in the land which has not been represented. These general rules may

Against tenant alone.

Against landlord alone.

Against both.

could not harm a reversioner, since the latter could not meet it, would probably not be followed in Scotland.

¹⁹ Metropolitan Assn. v. Petch, 5 C.B.N.S. 504; Cooper v. Crabtree, 45 L.T.N.S. 587; Dobson v. Blackmore, 9 Q.B. 991; Kidgill v. Moor, *supra*,¹⁸.

²⁰ Jones v. Chappell, L.R. 20 Eq. 539, 543, *per* Jessel, M.R.; Battishill v. Reed, *supra*,¹⁷; Simpson v. Savage, 1 C.B.N.S. 347.

²¹ Cox v. Glue, 5 C.B. 533 (common).

²² Simpson v. Savage; Jones v. Chappell, 20; Mumford v. Oxford, &c., Ry., 1 H. and N. 34.

²³ Cases in Wood, Nuisance, 946.

²⁴ Kinloch v. Robertson, 1756, M. 13163; Murray v. Buchanan, 1776, M. 16636; Robertson v. Campbell, 1802, M. Public Police, App. 3. As in Fairfax v. Greenshields, 1828, 7 S. 184, the complaint was only of the use of the premises for smelting, the principle on which the decision proceeded seems unsound.

Liability of
landlord for
tenant's acts.

probably be a sufficient guide in framing the instance in all actions of interdict or for decree *ad factum præstandum*. But the whole subject may be fitly illustrated by a brief account of the cases in which claims of damages have been raised. Either in this shape or in the form of an action of relief between the landlord and tenant themselves, the substantial question is with whom the ultimate liability for damages lies. As the tenant has possession, the direct acts or omissions out of which the question arises are his; so that the point raised may be stated more specifically thus: In what circumstances is a landlord liable along with or in relief of his tenant where damages are due to third parties?

Culpa.

If the injury complained of be due to the specific *culpa* or negligence of the tenant alone, he alone is liable;²⁵ the doctrine of *respondeat superior* has no application between persons so independent of each other as are landlord and tenant.²⁶ Thus, where damage to neighbouring land was caused by an overflow of water on it through the choking up of a drain, which if kept clear would have been amply sufficient to carry off the water innocuously, the landlord, who had done his part, was held to be free from liability.²⁷ And, where a lessee had, as permitted by his lease, erected a reservoir for his own purposes, and it burst during the tenure of an assignee, the assumed cause thereof being defective repair, the landlord was assoilzied from liability for the injury caused to neighbouring land by the flood which thus escaped.²⁸ 'When a proprietor lets his house or land to a tenant 'with the view that he use or enjoy it without injury to his 'neighbour, which he will do if the ordinary care is taken, why 'should the landlord and not the tenant be answerable for this 'want of care on the part of the tenant?'²⁹

Responsibility
for repair of
premises.

When the question turns on the use made of premises which are in good repair—as, where a grating or trap-door in a public place, in itself sufficient (if properly kept) is left open and injury is thereby caused to a neighbour or member of the public, the

²⁵ The old Acts, 1528, c. 6; 1594, c. 231; 1681, c. 4, and 1685, c. 24, making landlords responsible in certain cases are in desuetude.

²⁶ See *per* L. Medwyn in *Weston v. Potterrow Tailors*, 1839, 1 D. 1218, 1224; but see the different position of one who has only a revocable licence—*White v. Jameson*, L.R. 18 Eq. 304.

²⁷ *Lyons v. Anderson*, 1886, 13 R. 1020.

²⁸ *Henderson v. Stewart*, 1818, Hume 522, 15 S. 868, note, 3 Sh. and M'L. 367. (There was a stipulation that the lessee should indemnify neighbours, but the decision did not depend on this). See also *Thomson v. Gray*, 1842, 5 D. 377. *Rankin v. Dixon & Co.*, 1847, 9 D. 1048, raised but did not decide the point.

²⁹ *Per* L. Medwyn, 1 D. 1226 (overruling *L. Meadowbank's charge*, p. 1220). The example given is cattle straying.

liability of the tenant alone can scarcely be doubted.³⁰ Where, on the other hand, the cause of the damage is the disrepair of the premises, the question comes to be on whom lies the responsibility of putting or maintaining them in order.³¹ This question does not seem to have been sufficiently before the minds of the Judges who decided a case,³² probably with entire justice in the result, but apparently on wrong grounds. A horse lawfully sent to graze in a park was killed by falling during the night into an old mine shaft, covered with rotten boards in which a hole had been for some time observable but otherwise unfenced. The owner of the park when sued for damages pleaded that the shaft was in the custody of his mineral tenants, whose lease was still current. The shaft contained water, and had been long disused; and the Court in mulcting the defender in damages might well have proceeded on this circumstance as practically throwing the pit-mouth back on the landlord's hands. But the judgment was variously based on the difficulty of ascertaining what person was tenant, on the analogy of a master's liability for his servant's negligence, and on the landlord's right of relief against his tenant, if the latter were primarily liable. These views are displaced in a later case, where damage was caused to a shop through water overflowing from a water-closet in a flat above it, and action for damages was brought against both the landlord and tenant thereof; and the law was thus compendiously stated:—'If the jury were satisfied on the evidence that ' the landlord has been guilty of any fault or negligence,³³ either ' by himself or any one employed by him from which the damage ' arose, he is liable; or if they were satisfied that the water- ' closet in question when let with the house to [the tenant] was ' so constructed as necessarily or in strong probability from its ' ordinary use to lead to the damage sustained, the landlord ' would also be liable; but if the water-closet was constructed ' in the usual way and not in its construction such as to lead ' to what occasioned the damage, except from the negligence, ' ignorance, or mischievous conduct of those who used it, then

³⁰ *Hughes v. Macfie*, 2 H. and C. 744, and cases collected in Rankine, Landownership, 312.

³¹ *Supra*, pp. 219, 222. See *Weston*,²⁶ (overflow from water-closet on upper floor); and see the cases collected in Rankine, Landownership, 521, in which, however, the respective liability of landlord and tenant did not arise; and add *M'Lean*

v. Warnock, 1883, 10 R. 1052. The conflict of decisions in America is brought out in Wood, Nuisance, 952.

³² *Mack v. Allan*, 1832, 10 S. 349. The case is noted as departing from the rule in Wood, Nuisance, 954, and the dicta are doubted in *Weston*, *supra*,²⁶

³³ Non-feasance or misfeasance—*Todd v. Flight*, *infra*,³⁴

‘ the landlord of this tenement could not be held responsible for ‘ what happened.’³⁴

Nuisance.

The same rules apply to cases in which nuisance (in the narrower sense) is committed, to the injury of the neighbourhood. If the nuisance existed at the time when the subjects on which it is caused were let, the landlord will be liable for upholding and continuing it, if it be not abated,³⁵ but the tenant is not thereby absolved from liability.³⁶ If the nuisance come into existence during the lease the landlord is liable only if it must necessarily or by strong probability result from the ordinary use of the premises let, or of the use for which they were let, or if the obnoxious operations are carried on under his authority.³⁷

Dunn v.
Hamilton.

The leading Scotch case is *Dunn v. Hamilton*.³⁸ The action concluded for interdict against the landlord, tenant, and subtenants of a turkey-red dye-work on a stream, from polluting it with dye stuffs which were said to be poured into it by the subtenants. The landlord set up in defence a prescriptive use of the premises as dye-works; acquiescence of the pursuer, an inferior riparian proprietor; filtration of the outflow; denial of the nuisance; and non-responsibility for occasional injury which might be caused through the negligence or misconduct of the occupants. The tenant denied that during his occupation he had polluted the water or that in subletting he had authorised pollution. The subtenants set up substantially the same pleas as the landlord, with the exception of the last. The lease bore that the premises were let to be used for the purpose of bleach-

³⁴ *Per* L.J.-C. Boyle in *Weston*, *supra*,
²⁶, at 1 D. 1230; *Caledonian Ry. Co.*
v. Greenock Sacking Co., 1875, 2 R.
671; *Langwill v. Mackay*, 1885, 29 *Journ.*
of Jurisp., 222. See foreign cases in
illustration—*Nelson v. Liverpool Brewery*
Co., L.R. 2 C.P.D. 311, and *Todd v.*
Flight, 9 C.B.N.S. 377 (fall of chimney-
pot); *Chauntler v. Robinson*, 4 *Exch.*
163 (fall of wall between houses); *Cheet-*
ham v. Hampson, 4 T.R. 318 (fences);
Russell v. Shenton, 3 Q.B. 449 (drains);
Gandy v. Jubber, 5 B. and S. 78, and
undelivered judgment, 9 B. and S. 15,
with which cf. *Pretty v. Bickmore*, L.R.
8 C.P. 401 (insufficient gratings over
areas on street); *Gwinnell v. Eamer*,
L.R. 10 C.P. 658 (coal-shoot out of
repair at time of lease without landlord's
knowledge); American cases in *Wood*,
Nuisance, 953.

³⁵ *Rex v. Pedly*, 1 A. and E. 822,
per L. Denman; *Rosewell v. Prior*,
12 Mod. 639; *Leslie v. Pounds*, 4 Taunt.
649; *Bishop v. Bedford Charity Trs.*,
1 E. and E. 697; though he cannot enter
to abate the nuisance—*Thomson v. Gibson*,
7 M. and W. 456, *per* Parke P.; *Wood*,
Nuisance, 950.

³⁶ *Brown v. Russell*, L.R. 3 Q.B. 251;
Wood, *ibid.*

³⁷ *Fleming v. Ure*, 1720, M. 13159;
Vary v. Thomson, 1805, M. Public
Police App. 4; *Collins v. Hamilton*,
26th Jan. 1836, F.C. 291 (issue); 1837,
15 S. 895; *M'Callum v. Forth Iron*
Co., 1861, 23 D. 729; *Saxby v. Man-*
chester, &c., Ry., L.R. 4 C.P. 198.

³⁸ 1837, 15 S. 853, aff. 3 Sh. and M'L.
356; *Rich v. Basterfield*, 4 C.B. 805;
Wood, *Nuisance*, 958.

ing, dyeing, or printing, and any other operations connected with bleaching, dyeing, or printing, or for agriculture. The issue regarding the landlord and tenant put it to the jury whether they by themselves or another or others authorised by them polluted the water. The presiding Judge (Lord Jeffrey) directed the jury (in substance) that, as there was nothing but the lease and sublease to connect these defenders with the supposed nuisance, they were not answerable unless they had sanctioned it; that the lease did not imply a licence to commit nuisance; and that, if a dye-work could without much *extra* expense be carried on without nuisance, these defenders were entitled to a presumption that such was the import of the lease. There was a verdict for all the defenders. The Inner House sustained a bill of exceptions against these directions, on the special ground that the landlord, having in substance made common cause with the subtenants, was barred—in an action of interdict as distinguished from an action of damages—from pleading that he had only authorised a legally conducted manufacture.³⁹ The House of Lords, in affirming the judgment, did not proceed on this ratio—since denial of the existence of a nuisance was part of the landlord's case, and did not involve him in a maintenance of all the subtenants did—but on the circumstance that an erroneous direction as to the nature of a nuisance affected the issue in question as well as that with which the subtenants were concerned; and on the view that the presiding judge's reference to the lease restricted too greatly the landlord's liability, since the connection between the lease and the nuisance was a fact to be determined by the jury not only from the lease itself, but *aliunde*. 'If the operations connected with bleaching, dyeing, or printing would in the ordinary course of business create a nuisance, is the landlord to be irresponsible because the tenant might by possibility have avoided the nuisance and yet have obtained a reasonable profit, or have prevented the injury without much expense?'⁴⁰ An action of damages was brought at the same time by a manufacturing tenant of the pursuer in this case. The verdict here also was given for the defenders, and an exception against Lord Cockburn's charge, which substantially agreed with this *dictum*, was not persisted in.⁴¹

The distinction between what is the natural and necessary Necessary and casual injury.

³⁹ In a similar interdict against water pollution this doctrine was given effect to—Robertson v. Stewart, 1872, 11 M. 189.

⁴⁰ *Per* L. Chan. Cottenham, 3 Sh. and

M'L. 379, citing *Rex v. Moore*, 2 B. and Ad. 184 (pigeon shooting), *Rex v. Pedly*, *supra*, ³⁵.

⁴¹ *Collins v. Hamilton*, *supra*, ³⁷.

consequence of letting subjects for a particular purpose and what a consequence which it is optional to the tenant to bring about or avoid in the course of his occupancy is well established in England⁴² and America.⁴³ It is also fixed that, though a landlord is not liable for a nuisance which has commenced after the inception of a lease and without his authority (in the sense now explained), yet, if thereafter he renews the lease, he renews it with the nuisance, and liability supervenes.⁴⁴ But there is some doubt whether this consequence follows on the English equivalent for tacit relocation. The affirmative was held in a delivered judgment;⁴⁵ the negative in an undelivered judgment of a higher Court in the same case⁴⁶—the ratio of the latter view being that the relation ‘is a springing interest arising from the first contract ‘and parcel of it; so that if the lessee occupies for a number of ‘years, these years, by computation from the time past, make ‘an entire lease for so many years.’ It is not the duty of a landlord to obtain abatement of a nuisance for the origin or continuance of which he is nowise responsible.⁴⁷

Relief against
landlord for
eviction.

The question whether, in the event of proceedings being successfully taken for the abatement of a nuisance, the tenant shall have recourse against his landlord, as for eviction, under the warrantice,⁴⁸ will probably depend in every case on special circumstances showing that the risk was meant to be thrown wholly on one or other of the parties or on both together. If the lease gives authority to prosecute on the subjects let some business known to be necessarily attended with nuisance, if carried on in the usual way with a view to profit, in such a locality as that chosen,⁴⁹ the common law rule of warranty arising from grant for a special purpose would probably be applied. In other cases, and if there be no element of partnership, and especially if there be no indication in the lease of the purpose for which the tenant takes the premises, the risk of all the consequences of his own acts, and, among others, of entering on a lease under a

⁴² Cf. *Harris v. James*, 45 L.J.Q.B. 545, per L. Blackburn, with *Rich v. Basterfield*, 4 C.B. 783, *R. v. Pedly*, *supra*,³⁵; *R. v. Moore*, *supra*,⁴⁰.

⁴³ *Wood, Nuisance*, 77; and see p. 78 as to the effect of alienation by, or succession to, the offending landlord.

⁴⁴ *Rich v. Basterfield*, *supra*,⁴²; *Wood, Nuisance*, 78, 950; *Rosewell v. Prior*, *supra*,³⁵.

⁴⁵ *Gandy v. Jubber*, 5 B. and S. 78.

⁴⁶ 9 B. and S. 15.

⁴⁷ *R. v. Barrett*, 32 L.J.M.C. 36; *R. v. Stannard*, 33 L.J.M.C. 61 (brothels). In these cases and in *Wood, Nuisance*, 39, see what constitutes the ‘keeper of a ‘brothel.’

⁴⁸ As to which see *supra*, p. 196.

⁴⁹ See the (doubtful) distinction between known and other nuisances, with examples, in Rankine, *Landownership*, 334; and *Rosewell v. Prior*, 12 Mod. 639; *Wood, Nuisance*, 543.

mistaken idea of his powers in the management of the subjects, will lie with the tenant alone.⁵⁰

Where there is no eviction letting in warrandice, and no express obligation of relief, and especially if liability for relief has been repudiated *ab ante*, the landlord is not bound to repay to his tenant sums found due by the latter to a third party under a decree which in the event turns out to have been incompetently or erroneously granted in an action raised against the tenant.⁵¹

The same rules as those which obtain with regard to nuisance regulate the vindication of servitudes by neighbours and of public rights by members of the public; the prevention of infringement of these; the liability for damages in case of injury being caused through their infringement; and the relief which a tenant may have where the pursuer succeeds in his action or the third party enjoys his right. The tenant may be barred from recourse against his landlord through his own remissness in allowing encroachment or trespass, as where he had without demur allowed third parties for several years to encroach on a privilege of pasturage let with his farm.⁵² But, if the landlord steps in, and himself exercises, for the benefit of the lessee and of the subjects let, the privilege conveyed in a servitude right, but in such a way as to deteriorate the subjects, he must either restore them to their former condition or exercise the privilege to their advantage.⁵³

Relief for
payments not
due.

Servitude—
Public right.

III. QUESTIONS BETWEEN TENANTS OF THE SAME LANDLORD.

Where questions between tenants holding of the same landlord turn on nuisance or on the specific *culpa* of either, no speciality is involved in the circumstance that they have a common author.⁵⁴ Where the dispute arises, on the other hand, in regard to such incorporeal privileges across the march, as would, in the case of separate ownership, have been known as servitudes, it is important to observe that the rules regulating servitudes are inapplicable. The subject has been already noticed in the chapter on Possession.⁵⁵

⁵⁰ Murray v. Buchanan, 1776, M. 16636, Hailes 677. As to cases between landlord and tenant, in which third parties have had no concern, see *supra*, p. 214.

⁵¹ Stephen v. L. Adv., 1878, 6 R. 282 (salmon fishing facilities). The Crown (landlord) had in the interval obtained a decree against the third party, which involved the untenability of his claim against the tenant.

⁵² Stewart v. Wand, 1838, 16 S. 408.

⁵³ Dudgeon v. M'Leod, 1830, 8 S. 349 (weir repaired, but drawn too low).

⁵⁴ See a case in which the landlord was relieved of, and the fellow-tenant saddled with, the responsibility for irregularity of water-power in a stream, Tassie v. Mags. of Glasgow, 1822, 1 S. 503, 505 (N.E. 467, 469).

⁵⁵ *Supra*, p. 189.

CHAPTER XXVI.

PRIVILEGES AND PUBLIC BURDENS INCIDENT TO TENANCY.¹

THERE are certain public privileges incident to tenancy which are not, and certain others which are, associated with strictly correlative public burdens. It will be convenient to begin with privileges of the former sort—viz., the right to church sittings and burial-places, the parliamentary franchise, and the municipal franchise in royal burghs; and, as to the others, to treat burden and privilege together.

I. PRIVILEGES INDEPENDENT OF STRICTLY CORRELATIVE BURDENS.

A. *Right to Church Sittings and Burial-places.*

Church.

In the division of the area of a landward parish church, and of the landward portion of the area of a landward-burghal² parish church, after sittings have been allocated to the minister, elders, and poor, and family seats have been allotted to the heritors, the rest of the available space is divided among the heritors for the accommodation of their servants and tenants.³ It then falls to each heritor to allot this area (which for convenience is provided with seats or pews) among his tenants and dependents and the residenters on his estate, *quod* inhabitants of the parish. The

¹ The author has elsewhere (Law of Landownership, chaps. xi., xii., xiii., xxxvi.-xlii.) attempted to explain the rules which regulate the system of valuation, rating, and taxing, from the point of view of the owner of land, and the privileges which ownership confers on him. Many of the statutes deal equally with tenants. In order to avoid repetition, the reader will here be presumed in such cases to know the purview and scope of these Acts, and the machinery for assessing and collecting the imposts; and only

a brief statement of the liability involved in the occupation of heritable property will be here inserted.

² As to the letting by magistrates or commissioners of seats in a burghal church, see *Clapperton v. Edinburgh Mags.*, 1840, 2 D. 1385, and cases there.

³ See authorities collected in Duncan, Par. Eccl. Law, 222; Rankine, Landownership, 158; B. Pr. 1224; More's Notes, 254; Connell, Parishes, Suppl. 76; Dunlop, Par. Law, 46.

accommodation being frequently (or usually) insufficient, this allocation ought to be so equitably conducted as not to call for the interference of the sheriff, who is entitled, on application being made, to rectify gross disproportion at any time, and not merely when he proceeds to divide the whole area of the church.⁴ On the analogy of the principal division of the area, it may be assumed (though there seems to be no direct authority) that the rule in apportioning among the tenants would be to look to the amount of rent they pay.⁵ On cause being shown by any person interested, the division may be readjusted; and, though it would be the policy of the Court, and should be in the interest of the heritor, to make as little alteration as possible on ancient, and often hallowed, possession, it can scarcely be held that that possession can ever operate a prescriptive dedication of a particular pew or part of a pew to the use of the inhabitants of any particular part of an estate. It is certain that no heritor can alienate, with or without consideration, any part of the area allotted to him for his servants and tenants, so long, at least, as they require accommodation:⁶ and that the letting of such church sittings as are here in view is illegal.⁷

The parish churchyard belongs to the heritors in trust for Churchyard. themselves and all the inhabitants of the parish—including, of course, resident tenants. The allocation usually takes place in a less orderly way than that which has just been referred to. And no question seems to have arisen in regard to the right of a tenant as such.⁸

B. *Parliamentary Franchise.*⁹

Every male tenant, not disqualified¹⁰ by insanity, peerage,¹¹ alienage,¹² office,¹³ or under the Corrupt Practices Act,¹⁴ is entitled to vote in county or burgh, if he complies with the

Household and occupation franchises.

⁴ L. Kinnaird v. Matthewson, 1802, 4 Pat. 429, 441, 442.

⁵ See Duncan, p. 223.

⁶ Skirling v. Vernor, 1796, M. 7930 (the decision did not depend on the speciality).

⁷ Per L.P. Inglis in D. Roxburghe, 1876, at 3 R. 734; Clapperton, *supra*, ²; L.O. Manor in D. Abercorn v. Edinburgh Presbytery, 1870, 8 M. 733; and see Hamilton Mags. v. D. Hamilton, 1846, per L.J.-C. Hope, 8 D. 852.

⁸ See the authorities in Duncan, Par. Eccl. Law, 231; Rankine, Landowner-ship, 163.

⁹ See Nicolson on Elections, and his Analysis of Election Statutes; 48 & 49 Vict. c. 3, sect. 10.

¹⁰ Nicolson, Elections, 20-28, 83-86.

¹¹ See 2 & 3 Will. IV. c. 65, sect. 37, as to eldest sons of peers.

¹² See 33 Vict. c. 14, as to naturalisation.

¹³ 2 & 3 Will. IV. c. 65, sect. 36; 19 & 20 Vict. c. 58, sect. 8; 24 & 25 Vict. c. 83, sect. 13; 20 & 21 Vict. c. 72, sect. 17; 31 & 32 Vict. c. 48, sect. 8.

¹⁴ 46 & 47 Vict. c. 51, sects. 4-6, 10-21, 36-39; 31 & 32 Vict. c. 48, sect. 49.

conditions laid down in the Representation of the People (usually called the Reform) Act, 1884,¹⁵ which assimilates the county with the burgh franchise. He may be put on the roll, *quod* tenant, in virtue either of the household or of the occupation franchise.

(a) *Household Franchise.*

Extended to
counties.

The 2nd section of the Reform Act, 1884, enacts that 'a uniform household franchise . . . shall be established in all counties and boroughs throughout the United Kingdom, and every man possessed of a household qualification . . . shall, if the qualifying premises be situate in a county in . . . Scotland, be entitled to be registered as a voter, and when registered to vote at an election for such county.' A later section [7 (4)] defines the expression 'household qualification' to mean 'the qualification enacted by the 3rd section of the Representation of the People (Scotland) Act, 1868,¹⁶ and the enactments amending or affecting the same; and the said section and enactments shall, so far as they are consistent with this Act, extend to counties in Scotland.'

The 3rd section of the Act of 1868, thus extended to counties, runs in the following terms:—

31 & 32 Vict.
c. 48, sect. 3.

Every man¹⁷ shall in and after the year 1868 be entitled to be registered as a voter, and when registered, to vote at elections for a member or members to serve in Parliament for a burgh, who, when the sheriff proceeds¹⁸ to consider his right to be inserted or retained in the register of voters is qualified as follows, that is to say:—

1. Is of full age¹⁹ and not subject to any legal incapacity;²⁰ and
2. Is, and has been for a period of not less than twelve calendar months next preceding the last day of July,²¹ an inhabitant occupier²²

¹⁵ 48 & 49 Vict. c. 3. Earlier qualifications are saved (sect. 10)—see *infra*, p. 556.

¹⁶ 31 & 32 Vict. c. 48.

¹⁷ Excluding women—*Brown v. Ingram*, 1868, 7 M. 281.

¹⁸ Thereafter the qualification cannot be altered—*Dove v. Reid*, 1868, 7 M. 287.

¹⁹ One who was a minor when the assessor made up his list, but came of age before it came before the sheriff, was held qualified—*Campbell v. Richardson*, 1879, 7 R. 32.

²⁰ Last page, foot.

²¹ Of the year in which the claim was made—*Davidson v. Gray*, 1868, 7 M. 293.

²² Mr. Nicolson (*Analysis*, p. 8) makes

various shrewd suggestions as to the amount of continuity of residence. The only points decided are (in regard partly to cognate cases) that the claimant must possess at least a sleeping apartment on the premises; that uninterrupted abiding is not requisite; that the *animus reverendi* and power to return at will must be shown (*Powell v. Guest*, 34 L.J.C.P. 69; *Ford v. Hart*, L.R. 9 C.P. 273; *Taylor v. St. Mary Abbot*, L.R. 6 C.P. 311; *Gray v. Swanson*, 1868, 7 M. 328; *Manson v. Sinclair*, 1868, 7 M. 329; *Stewart v. Doull*, 1868, 7 M. 330); that residence six times in the year for periods varying from two days to a fortnight on business and without family does not

as owner,²³ or tenant, of any dwelling-house²⁴ within the burgh.

Provided that no man shall, under this section, be entitled to be registered as a voter who at any time during the said period of twelve calendar months shall have been exempted from payment of poor-rates on the ground of inability to pay;²⁵ or who shall have failed to pay on or before the 1st day of August in the present, or the 20th day of June in any subsequent year all poor-rates (if any) that have become payable by him in respect of said dwelling-house, or as an inhabitant of any parish in said burgh up to the preceding 15th day of May;²⁶ or who shall have been in the receipt of parochial relief within the twelve calendar months next preceding the said last day of July.²⁷ Provided also that no man shall, under this section, be entitled to be registered as a voter by reason of his being a joint-occupier of any dwelling-house.

The 'inhabitant occupier' need not have resided in the same dwelling-house during the whole year; for 'different premises occupied successively' occupied in immediate succession²⁸ by any person as owner or

qualify (*Kennard v. Allan*, 1879, 7 R. 1.—but it is difficult to distinguish this case from *Bond v. St. George Parish*, L.R. 6 C.P. 312); and that it is not enough to have a residence if the claimant does not actually reside (*Cay, Elections*, 431, 436, 442); nor to have a room in the house of a relative (*Adair v. Murray*, 1874, 2 R. 11).

²³ Including tenants for not less than fifty-seven years exclusive of breaks—31 & 32 Vict. c. 48, sect. 59.

²⁴ *I.e.*, 'any house or part of a house 'occupied as a separate dwelling' [Act 1884, sect. 7 (4)]—thus omitting the requirement in Act 1868, sect. 59, that, where poor-rates are levied, the occupier should be separately rated.

²⁵ Exempted on his own application (*Sutherland v. Sinclair and Sharp v. Smith*, 1868, 7 M. 323, 324), not on application by an unauthorised agent (*Sinclair v. Harper*, 1868, 7 M. 324); nor if not rated only through absence of his name from the valuation roll (*Ross v. Gilchrist*, 1868, 7 M. 323). Exemption during any part of the year suffices (*Stewart v. Barnetson*, 1868, 7 M. 324). The remedy, where persons have been improperly or erroneously omitted from the list on the ground of exemption, is given in Act 1868, sect. 17.

²⁶ See *Ross v. Gilchrist*, *supra*, ²⁵.

Not including arrears due for earlier years (*Hewat v. Henderson*, 1874, 2 R. 12). As to the form of the 'demand-note,' see Act 1868, sect. 18, and *Mackenzie v. King*, 1875, 3 R. 8.

²⁷ Receipt of relief for an idiot child does not exclude the father (*Gilmour v. Cannon*, 1873, 1 R. 12); nor is a voter excluded by receiving relief after 31st July in the year of the claim (*Davidson v. Cannon*, 1879, 7 R. 41); nor does medical or surgical relief to the claimant or any member of his family disqualify (48 & 49 Vict. c. 46); and it is not enough to call a dole from the poor's funds a 'donation' to make it charity instead of relief (*Douglas v. Ballingall*, 1885, 13 R. 78). A person on the electoral roll may vote, though a pauper—*Anstruther v. Williamson*, 1886, 13 R. 577.

²⁸ In the same burgh, though not necessarily in the same division of it (48 & 49 Vict. c. 23, sect. 10): or in the same county and also in the same division of it, if it is divided for the purposes of representation (*Stewart v. Allan*, 1868, 7 M. 315). It seems the better reading of the definition of 'burgh' in Act 1868, sect. 59, to admit of successive occupation in different burghs in a district of burghs as qualifying. An interval of

'tenant during the twelve calendar months next previous to the last day of July in any year shall have the same effect in qualifying such person to vote for a burgh or county respectively as a continued occupancy of the same premises in the manner herein provided' (Act 1868, sect. 13). The rule of burgh franchise law prior to the Reform Act of 1884²⁹ is now general—that occupancy of the same or of different premises within the same ambit under the title of owner for one part of the qualifying period and of tenant for another part gives a good qualification. It is probably competent to combine this 'household' occupation and the 'service' inhabitancy, which qualifies under the 3rd section of the Act of 1884.³⁰

(b) *Occupation Qualification.*

Assimilated in
county and
burgh.

The occupation qualification in counties and burghs is assimilated by the 5th section of the Reform Act of 1884,³¹ in the following terms:—'Every man occupying any land or tenement³² in a county or borough in the United Kingdom of a clear yearly value³³ of not less than ten pounds shall be entitled to be registered as a voter, and when registered, to vote at an election for such county or borough in respect of such occupation, subject to the like conditions respectively as a man is at the passing of this Act entitled to be registered as a voter and to vote at an election for such county in respect of the county occupation franchise, and at an election for such borough in respect of the borough occupation franchise.' The effect of this enactment in regard to the county occupation qualification is simply to reduce the value of the qualification from £14 to £10, and, in regard to the burgh occupation qualification, to leave it exactly as it was. For the 'county occupation franchise' means 'the franchise enacted by the 6th section of the Repre-

about a fortnight in which the claimant resided in an inn disqualified (*Adair v. Kay*, 1874, 2 R. 9). The claim should narrate the whole of the qualifying occupancies (*Hill v. Collins*, 1868, 7 M. 283; *Wilson v. Kerr*, 1878, 6 R. 21). The assessor's list requires only to have the last (*Adshead v. Wright*, 1868, 7 M. 283). But if the applicant have changed his occupancy before the sheriff considers his claim he must claim on his new occupancy in order to get on the roll—*Smith v. McDonald*, 1886, 14 R. 125.

²⁹ *Hannah v. Dodds*, 1875, 3 R. 7. The old county rule *contra* is laid down in *Moneriff v. Dalgleish*, 1868, 7 M.

315; *Greig v. MacCreath*, 1882, 10 R. 11.

³⁰ See *Nicolson, Analysis*, p. 13.

³¹ 48 & 49 Vict. c. 3.

³² These words include 'any part of a house separately occupied for the purpose of any trade, business, or profession,' and 'lands and heritages' (sect. 11). The last expression is defined in the Valuation Act, 17 & 18 Vict. c. 91, sect. 42; and includes shootings apart from as well as together with buildings—*Paterson v. Johnston*, 1879, 7 R. 17—and salmon-fishings—*Dunn v. Cotesworth*, 1874, 2 R. 5.

³³ *I.e.*, 'the annual value as appearing in the Valuation Roll' (*ibid.*).

'sentation of the People (Scotland) Act, 1868 : ' and the 'borough occupation franchise' means 'the franchise enacted 'by the 11th section of the Act of the session of the second 'and third years of the reign of King William the Fourth, 'chapter sixty-five [the Reform Act of 1832].'³⁴ And these enactments are as follows :—

(1) *County Occupation Franchise.*

The Act of 1868, sect. 6,³⁵ provides : ³⁶—

Every man shall be entitled to be registered as a voter, and when registered to vote at elections for a member to serve in Parliament for a county, who, when the sheriff proceeds to consider his right to be inserted or retained in the register of voters is qualified as follows, that is to say :—

1. Is of full age and not subject to any legal incapacity ; and
2. Is and has been during the twelve calendar months immediately preceding the last day of July³⁷ in the actual personal occupancy³⁸ of lands and heritages within the county, of the annual value of

³⁴ *Ibid.*, sect. 7 (6 and 7).

³⁵ 31 & 32 Vict. c. 48.

³⁶ See the notes on pp. 550, 551, to which the following are merely supplementary.

³⁷ *Waddell v. McPhail*, 1865, 4 M. 130. A tenant with a Whitsunday and separation ish cannot claim on possession of the whole farm in the year of removal ; though perhaps he might claim on the arable part—*Miller v. Robertson*, 1878, 6 R. 15. As to non-beneficial possession during repairs at entry, see *Donaldson v. Arrol*, 1879, 7 R. 8.

³⁸ If the occupant be a tenant, it will not affect his claim that he has become bankrupt, since he is left in possession—*Sutherland v. Forbes*, 1868, 7 M. 316 ; *Halley v. Eadie*, 1878, 6 R. 11. But his right must be other than fiduciary or in security—(see *Gairns v. Blackwood*, 1882, 10 R. 1) ; or defeasible at the will of the landlord—(*Darnley v. Stewart*, 1868, 7 M. 313 ; *Brown v. Smith*, 1873, 1 R. 5). This occupancy does not apply to a sporting privilege reserved to the landlord and his friends—*Girvan v. Campbell*, 1875, 3 R. 1. If a tenant assign who is not entitled to assign, the act probably disables both himself and his assignee from getting on the roll till the landlord intimates his intention to recognise the transaction or not—Andrew

v. Smith, 1868, 7 M. 312 ; see *Young v. Newbigging*, 1873, 1 R. 1. The old rules regarding defeasibility with office are superseded by the service franchise. As to the qualification of non-occupant tenants (mainly principal lessees) see *Nicolson, Elections*, 46, 64, and *infra*, p. 556. The phraseology here is equivalent to the expressions 'personal possession,' 'actual 'occupation' in the Reform Act of 1832, sect. 9, and means natural possession in the technical sense, differing from residence on the one side, and civil possession on the other (through subtenants, for example). See *Weatherhead v. Moffat*, 1878, 6 R. 20 ; *Johnston v. Buchanan*, 1879, 7 R. 7 ; *Lunan v. Allan*, 1880, 8 R. 13. The qualification is not, however, lost, though during a part of the qualifying period, not exceeding four months on the whole, the claimant has, by letting or otherwise, permitted the qualifying premises to be occupied as a furnished house by some other person (43 & 44 Vict. c. 6). In the case of a bowing of cows (*supra*, p. 255) everything will turn on the question whether in the actual case there is occupation of land ; and in the case of grass parks, continuity of possession throughout the year will have to be proved (see *Campbell v. Marshall*, 1868, 7 M. 312).

fourteen pounds or upwards, as appearing on the valuation roll of such county.³⁹

Provided that no man shall under this section be entitled to be registered who at any time during the said period of twelve calendar months shall have been exempted from payment of poor-rates on the ground of inability to pay; or who shall have failed to pay on or before the 1st day of August in the present or the 20th day of June in any subsequent year, all poor-rates (if any) that have become payable by him in respect of said lands and heritages up to the preceding 15th day of May; or who shall have been in the receipt of parochial relief, within twelve calendar months next preceding the said last day of July.

Proof of
tenancy.

In registration questions the title of a tenant is proveable *prout de jure*, except in cases where personal occupancy is by the Reform Act of 1832, sect. 9, dispensed with or the claim is laid on payment of a grassum.⁴⁰ But the rule (in order to avoid fictitious qualifications) is practically the same as that which holds generally in regard to the constitution of leases, since in cases where the alleged title is a lease for more than a year some writ instructing such a right seems to have always been required.⁴¹ Where writs are produced, not merely to instruct the requisite possession, but to prove title, they will not be looked at if not appropriately stamped.⁴² The title must be such that it does not suffer from *ex facie* invalidity,⁴³ and, except where there has been an excamb of possession,⁴⁴ it must have been dated and delivered and the title otherwise completed prior to the enfranchising period.⁴⁵

Joint tenancy.

Joint tenants have each a vote provided the annual value of the subjects held by them be sufficient when divided by their

³⁹ If part of a subject is sublet, the value of the part retained may be proved *extrinsecus*—Reid *v.* Mathieson; Donaldson *v.* M'Farlane, 1869, 8 M. 14, 22. As to grass mail—Thomas *v.* M'Naughton, 1870, 9 M. 10. See interruption of continuity through subletting, though the subtenant's possession was only for two days—Brown *v.* Blackwood, 1869, 8 M. 8.

⁴⁰ *Infra*, p. 556.

⁴¹ Cay, 291, 362; Tait *v.* Haldane, 1865, 3 M. 416; Rutherford *v.* Laidlaw, 1863, 2 M. 174; Rutherford *v.* Dunn, 1872, 11 M. 4; Campbell *v.* Marshall, 1868, 7 M. 312, but see Hilson *v.* Fairs, 1870, 8 Sc.L.R. 39, and Skeete *v.* Allan, 1879, 7 R. 15 (joint-tenant).

⁴² Tait *v.* Haldane, *supra*, ⁴¹; Miller *v.* M'Currach, 1878, 6 R. 10; and see later cases of ownership—Skeete *v.* Turnbull, 1879, 7 R. 14; Blackwood *v.* Ruickbie, 1881, 9 R. 8, and cases there. As to the question how far the validity of the landlord's title may be inquired into, see Stewart *v.* Phimister, 1868, 7 M. 313; Douglas *v.* Adair, 1874, 2 R. 10.

⁴³ See Nicolson, Elections, 71; King *v.* Mitchell, 1870, 9 M. 15. As to the question, whether it is *jus tertii* to object, see cases there, and Skeete *v.* Buchanan, 1879, 7 R. 15.

⁴⁴ Paterson *v.* Millar, 1878, 6 R. 22.

⁴⁵ Duncan *v.* Smith, 1869, 8 M. 12; Rea *v.* Thomas, 1870, 9 M. 8.

number to give each of them the money qualification,⁴⁶ and 'provided always that no greater number of persons than two shall be entitled to be registered as . . . joint tenants of the same lands and heritages unless their shares or interests in the same shall have come to them by inheritance, marriage,⁴⁷ marriage-settlement, or *mortis causa* conveyance, or unless such . . . joint tenants shall be *bond fide* engaged as partners carrying on trade or business⁴⁸ in or on such lands and heritages.'⁴⁹ The operation of the 13th section of the Act of 1868 with regard to successive occupancy has been already noticed. It is necessary to add that (joint tenancy being available here, though not under the household franchise) continuous occupation partly as sole and partly as joint tenants of the same subjects is enough if the joint interest be adequate under the above rule.⁵⁰ Seeing that the statutory period is different in the ownership and in the occupation sections of the Act of 1868 successive occupation as owner and tenant cannot be combined.⁵¹ The same rules apply to the combination of occupancies held simultaneously;⁵² but a long leaseholder is not regarded as an owner in this relation.⁵³ The provision in the 9th section of the Reform Act of 1832 for enfranchising one who inherits or obtains by marriage-settlement or *mortis causa* disposition right to a qualifying lease within the qualifying period is carried over to the new constituency by the Act of 1884.⁵⁴

(2) *Burgh Occupation Franchise.*

The 11th section of the Reform Act of 1832,⁵⁵ so far as relevant to the present matter, runs as follows:—

Every person not subject to any legal incapacity shall be entitled to be registered as hereinafter directed, and to vote at elections for any

⁴⁶ Not the actual value of their interest (*Blair v. Torrance*, 1868, 7 M. 319).

⁴⁷ The insertion of this word here and in Act 1832, sect. 9, does not qualify a husband either as sole or joint tenant of premises of which the real tenant is his wife (*Blair v. Baptie*, 1865, 4 M. 124; *M'Queen v. Dunn*, 1874, 2 R. 3).

⁴⁸ Including farming (*Semple v. M'Kirdy*, 1868, 7 M. 317); and though the claimant reside furth of Scotland (*Stewart v. Smith*, 1868, 7 M. 318); and his alleged partner be a minor (*Blackwood v. Thorburn*, *ibid.*). See the section observed on in *Thomas v. M'Nab*, 1870, 9 M. 9.

⁴⁹ Act 1868, sect. 14.

⁵⁰ *Blackwood v. Moffat*, 1870, 9 M. 7. (Question as to different subjects and successive joint tenancies of these not decided).

⁵¹ *Moncrieff v. Dalgleish*, 1868, 7 M. 315; *Greig v. M'Creath*, 1882, 10 R. 11.

⁵² *Stewart v. Scouller*, 1869, 8 M. 11; *Blackwood v. Moffat*; and *Hilson v. Laidlaw*, 1870, 9 M. 7, 12.

⁵³ *Kirk v. M'Gowan*, 1870, 9 M. 11.

⁵⁴ Sect. 7 (8); *Stalker v. Young*, 1885, 13 R. 77.

⁵⁵ 2 & 3 Will. IV. c. 65. Many of the expressions are similar to those illustrated in the above notes, which are therefore here only referred to generally.

of the cities, burghs, or towns, or districts of cities, burghs, or towns here-inbefore mentioned, who when the sheriff proceeds to consider his claim for registration, shall have been for a period of not less than twelve calendar months next previous to the last day of . . . July in any future year in the occupancy . . . as . . . tenant of any house, warehouse, counting-house, shop, or other building⁵⁶ within the limits of such city, burgh, or town which either separately or jointly with any other house, warehouse, counting-house, shop, or other building within the same limits, or with any land owned and occupied by him or occupied under the same landlord and also situate within the same limits, shall be of the yearly value of ten pounds: Provided always that the claimant shall have paid on or before the 20th day of . . . July in any future year, all assessed taxes,⁵⁷ which shall have become payable by him in respect of such premises, previously to the 6th day of April then next preceding: Provided also that no such person shall be entitled to be registered or to vote in . . . any future year unless he shall have resided for six calendar months next previous to the last day of . . . July in any future year within such city, burgh, or town, or within seven statute miles of some part thereof:⁵⁸ . . . Provided also that no person shall be entitled to be registered or to vote for any city, burgh, or town, who shall have been in the receipt of parochial relief within twelve calendar months next previous to the last day of . . . July in any succeeding year.

(3) *Franchises Saved in the Reform Act of 1884.*

Tenancy qualification of 1832.

The Reform Act of 1884⁵⁹ by its 10th section saves the right of any person who, on 6th December 1884, was on the roll, to be from time to time registered and to vote, as if the Act had not passed. But if that Act would also qualify him, the new qualification is alone entered on the roll. In the present connection, it is only necessary to refer in a few words to the tenancy qualification (apart from occupancy and residence) conferred by the Reform Act of 1832, sect. 9, on tenants holding under leases for not less than fifty-seven years (exclusive of breaks at the option of the landlord),⁶⁰ or for life, where the clear yearly value to them is not less than £10, or for not less than nineteen years, with a clear yearly value of £50; or where they have paid a grassum of £300. Cases such as these seldom

⁵⁶ As to a pig-sty, not constantly tenanted, and situated on a farm partly within a burgh, see *Johnston v. Guild*, 1884, 12 R. 42.

⁵⁷ Now inhabited house duty, 13 & 14 Vict. c. 36, and later Acts. See *Gray v. Stewart*, 1868, 7 M. 285.

⁵⁸ For the purposes of measurement all the divisions of a burgh are deemed

to form the same parliamentary burgh (48 & 49 Vict. c. 23, sect. 13 [3]).

⁵⁹ 2 & 3 Will. IV. c. 65.

⁶⁰ These are 'owners,' and if holding jointly, are joint tenants in the sense of the Act 1884, sect. 4 (2), which qualifies only one of them to vote—*Cunninghame v. Grossart*, 1886, 14 R. 121.

occur in modern practice, and it will be enough to refer here to the statute and the most recent commentary on it.⁶¹

C. Municipal Franchise in Royal and Parliamentary Burghs.

In these burghs the municipal is the same as the parliamentary franchise.⁶² In royal burghs it is besides conferred on persons who possess the qualifications within the royalty but beyond the parliamentary boundary, or within any extension of the municipal boundary beyond the royalty or parliamentary boundary, or in burghs which do not send or contribute to send a member to Parliament: in parliamentary burghs, also on those who possess the qualifications within the municipal boundaries where these extend beyond the parliamentary limits. To this constituency are now added females who are not married and married females not living in family with their husbands, provided in each case they are otherwise qualified.⁶³

II. PUBLIC BURDENS OF TENANTS AND THE CORRELATIVE PRIVILEGES.

A. PAROCHIAL.

1. *Parochial Ecclesiastical Burdens.*

No part of these burdens—which are connected with the provision and maintenance of parish churches, manses, glebes, and ministers' grass—is thrown on tenants, since the word 'parochiners' in the old Acts which regulate the burdens has been from the first read as meaning 'heritors' only.⁶⁴ And though under the 6th section of the Valuation Act⁶⁵ a lessee of lands and heritages for more than twenty-one years, or in the case of minerals for more than thirty-one years, 'shall be deemed 'and taken to be also the proprietor of such lands and heritages 'in the sense of this Act,' it has been determined that that statute was not intended as a taxing Act, introducing a liability where it did not before exist, and therefore did not throw these burdens on persons in that position.⁶⁶

⁶¹ Nicolson, *Elections*, 46, 71.

⁶² 3 & 4 Will. IV. cc. 76, 77; 20 & 21 Vict. c. 70; 24 & 25 Vict. c. 36; 31 & 32 Vict. c. 108 (the leading Act).

⁶³ 44 Vict. c. 13, sect. 2. As to disqualification through corrupt or illegal practices at elections, see 31 & 32 Vict. c. 43, sect. 8; 46 & 47 Vict. c. 51, sects. 6, 9, 10, 36, 37; 35 & 36 Vict. c. 33,

sect. 24 (continued annually).

⁶⁴ Act of Secret Council, 1563, in 13 S. 158; 1572, c. 54; 1597, c. 232; 1617, c. 6.

⁶⁵ 17 & 18 Vict. c. 91.

⁶⁶ *M'Laren v. Clyde Trs.*, 1865, 4 M. 58, aff. 6 M. (H.L.) 81; and see *Traquair's Trs. v. Innerleithen Her.*, 1870, 9 M. 234.

2. *Poor-Rates.*

On owners and occupiers.

These, when levied under the Poor Law Act of 1845,⁶⁷ can now⁶⁸ be levied only in one mode, viz.: to the extent of one-half from the owners, and to the extent of the other half from the tenants or occupants of all lands and heritages within a parish or combination, rateably according to the annual value of such lands and heritages (Act 1845, sect. 34). Under the head of 'owners' are included tenants of land whereon houses have been or shall be built by them under building leases (sect. 44); and tenants under long leases generally, where substantially the ownership had passed to the lessee.⁶⁹ The term 'occupant'⁷⁰ is wider than 'tenant'; yet in one case the tenant is not an occupant, for the lessor of a house let furnished remains the occupant and pays the rates and taxes.⁷¹ The assessment is made in such a way that half of it is laid on the owners as a class, and the other half on the tenants or occupants as a class;⁷² so that it may easily happen that on account of there being much unoccupied property, or much poverty, the amount per pound laid on the former may be less than the rate laid on the latter class.⁷³

Classification.

The rental⁷⁴ is taken to be the 'annual value' of subjects let, whatever be the nature of the premises. This is a fallacious criterion of income where they are put to uses so diverse as are farms, dwelling-houses, shops, factories, and mines. It is, therefore, 'lawful for the Parochial Board, with the concurrence of the Board of Supervision, to determine and direct that the lands and heritages may be distinguished into two or more separate classes according to the purpose for which such lands are used and occupied, and to fix such rate of assessment upon the *tenants or occupants* of each class respectively, as to such Boards may seem just and equitable' (sect. 36)—the aim being to reach the probable means of the ratepayer, so far as to be gathered from the rent he pays.⁷⁵

Deductions.

Another element of variation emerges where the deductions, which must be made from the gross value in the valuation roll

⁶⁷ 8 & 9 Vict. c. 83.

⁶⁸ 24 & 25 Vict. c. 37.

⁶⁹ *Barrhead Ry. v. Caledonian Ry.*, 1855, 17 D. 1148, rev. 22 D. (H.L.) 1.

⁷⁰ See *L.N.-W. Ry. v. Buckmaster*, L.R. 10 Q.B. 70.

⁷¹ *Macome v. Dickson*, 1868, 6 M. 898—at least in a question of relief.

⁷² See questions between outgoing and

incoming tenants in *Guthrie's Dec.* 340, 342.

⁷³ *Galloway v. Nicolson*, 1875, 2 R. 650; but see *Macdonald v. Armour*, *infra*, p. 568.

⁷⁴ As to established usage retainable, see sect. 35, and *Croll v. Sc. Central Ry.*, 1861, 23 D. 747.

⁷⁵ B. of Supervision's Circular, 30th April 1868.

on account of repairs, insurance, and other expenses necessary to maintain the lands and heritages in their actual state, differ in regard to different classes of subjects, as must necessarily be the case (sect. 37).⁷⁶ The rates, taxes,⁷⁷ and public charges payable in respect of the subjects rated are also deducted from the gross rent; and no mine or quarry can be assessed, unless it has been worked during some part of the year preceding the day on which the assessment is ordered to be levied (*ibid.*).

The actual levy does not necessarily follow these rules. For, ^{Incidence of levy.} on the one hand, the collector of such assessment may 'levy the whole thereof from the tenants or occupants, who shall be entitled to recover one-half thereof from the owners, or to retain the same out of their rents, on production of a receipt granted by the collector' (sect. 43); but this mode of collection is only available when the rate laid on owners and occupiers is equal.⁷⁸ On the other hand, 'where any lands or heritages shall be separately let at a rent not amounting to £4 per annum, and the names of the occupiers thereof shall not have been entered on the valuation roll, the proprietor of such lands and heritages shall be charged with and have to pay the whole of the assessments on such lands and heritages separately let as aforesaid'—with relief for reimbursement so far as they are tenant's charges.⁷⁹ And, apart altogether from the amount of the rental,⁸⁰ ^{Exemptions.} the Parochial Board may 'exempt from payment of the assessment or any part thereof, to such an extent as may seem proper and reasonable, any person or class of persons on the ground of inability to pay.'⁸¹

The correlative privilege conferred on tenants and occupants is ^{Vote for Parochial Board.} the right to vote at the election of the elective members of the Parochial Board. In burghal parishes and combinations, occupants (like owners) have votes rising in number from one to six each according as the annual value of the subjects they occupy is less than, or exceeds £20, or exceeds £40, £60, £100, or £500, 'and when any occupant shall also be the owner of lands and

⁷⁶ In regard to public works—see Smith, *Poor Law*, p. 167; Reid, *Poor Law Digest*, 66 *seqq.*

⁷⁷ Not income tax, which is a personal impost, *Ed. and Gl. Ry. v. Hall*, 1866, 4 M. 1006.

⁷⁸ *Galloway v. Nicolson*, *supra*,⁷³

⁷⁹ 17 & 18 Vict. c. 91, sect. 31.

⁸⁰ *Douglas v. Dickie*, 1868, 1 Poor L. Mag., N.S. 365.

⁸¹ 8 & 9 Vict. c. 83, sect. 42. As to other exemptions, see Smith, 114, 182; Reid, 94; Rankine, *Landownership*, 94, the principal of these in the present connection being in favour of premises occupied purely for religious, charitable, scientific, or fine art purposes. The subject is well treated by D. Crichton in 9 Poor L. Mag., N.S. 393, 449.

‘ heritages and assessed in both capacities, he shall be entitled to
 ‘ vote as well in respect of his ownership as of his occupancy. . . :
 ‘ Provided always that no person shall for himself have more
 ‘ than six votes in all, and that no person shall be entitled to
 ‘ vote who shall have been exempted from payment of his rates
 ‘ or assessment for relief of the poor on the ground of inability
 ‘ to pay, or who shall not have paid all such rates and assess-
 ‘ ments assessed upon and due from him at the time of so
 ‘ voting’⁸² (sect. 19). In parishes not burghal or combined,
 the elective members of the Board are determined by the votes
 of the persons assessed under the Poor Law Act, not being
 owners of subjects assessed at £20 a-year, or members of the
 Board as representing a town council or the kirk-session. The
 number of votes rises according to the value of the land occupied,
 conform to the above scale, and subject to the same provisoes
 (sect. 24). Corporations, companies, and joint occupants vote
 through a member or officer, or one of the joint occupants (sect.
 25).⁸³ The qualification of a candidate is, in the case of burghal
 parishes and combinations, fixed by the Board of Supervision at
 a sum (for ownership or occupancy) of not more than £50 a-year
 (sect. 17). In other parishes it consists simply of belonging
 to the electorate (sect. 23). The tenure of office is for one year
 (sects. 18, 23).

3. *School Rates.*⁸⁴

School rates.

The expenses of the School Board are paid out of the school fund, any deficiency in which is met by a local rate called the school-rate (sects. 43 and 44 of the Act of 1872). The School Board annually, not later than 12th June, certifies the deficiency to the Parochial Board, or other authority⁸⁵ charged with the duty of levying the assessment for the relief of the poor, and the sum is then added to the next poor-rate levied and collected with it and paid over to the School Board, without deducting anything for the expense of levying and collection (*ibid.* sect. 44).⁸⁶ If the ambit of the School Board includes two or more parishes or parts of two or more parishes, it certifies to each Parochial Board the amount of the rate on each pound of rental which they are to collect as school rate along with the poor-rate in their respective districts. If no poor-rates are levied, the School Board assesses

⁸² As to division into wards, see sect. 20.

⁸³ See the rules for elections, Smith, Poor Law, 20, 26.

⁸⁴ 35 & 36 Vict. c. 62; 41 & 42 Vict.

c. 46; 46 & 47 Vict. c. 56.

⁸⁵ This refers to cases where the Poor Law Act has never been adopted.

⁸⁶ Amended by 41 & 42 Vict. c. 78.

for and levies the school-rate as if it were poor-rate, and with all the powers of a Parochial Board, 'and the school-rate shall in all cases be levied and collected in the same manner as poor's assessment, and the laws applicable for the time to the imposition, collection, and recovery of poor's assessment shall be applicable to the school-rate' (ibid.).⁸⁷ But the exemption of parish ministers from liability, either as owners or occupants, for poor-rate in respect of their manses and glebes does not extend to school-rates.⁸⁸

The corresponding privilege is the right to vote in a School Board election. It is bestowed on 'all persons being of lawful age and not subject to any legal incapacity, whose names are entered on the latest valuation roll applicable to the parish or burgh for which the Board is to be elected, made up and completed not less than one month prior to the election as owners or occupiers of lands and heritages of the annual value of not less than £4, situated within such parish or burgh.'⁸⁹ An opinion, issued⁹⁰ soon after the passing of the Act, and generally acted on since, reads this clause as including unmarried women, joint occupants (where the value when rateably divided is sufficient for all), and occupants of subjects separately entered and coming up to the qualifying value on the aggregate; and as excluding corporations, companies, and firms, persons occupying in a fiduciary capacity only, tenants not in occupation, lodgers, bankrupts, and married women.

B. PAROCHIAL-BURGAL BURDENS.

There are certain burdens, which are distributed among the ratepayers according to parish areas in landward districts, and according to burgal areas elsewhere. In the former case the Local Authority—as the managing body is termed—is the Parochial Board; in the latter case it consists of the Town Council or Police Commissioners (or Trustees), as the case may be. The aims of the statutes thus administered are very various.

1. *The Public Health Acts.*⁹¹

In the case of burghs having a population of 10,000 or upwards according to the census last taken, or having a local Act for police purposes which makes suitable and sufficient pro-

Vote for
School Board.

In large
burghs.

⁸⁷ As to borrowing see sect. 45.

⁸⁸ *Hogg v. Auchtermuchty Sch. B.*, 1880, 7 R. 986; *Gillanders v. Campbell*, 1884, 12 R. 309.

⁸⁹ 35 & 36 Vict. c. 62, sect. 12 (2); see also sects. 1, 8-11; and 41 & 42 Vict. c. 78, sects. 29 and 30.

⁹⁰ *Per* Sol.-Gen. Rutherford Clark, 1873, in *Marwick, Sch. B. Elections*, 13; Sellar, 158.

⁹¹ 30 & 31 Vict. c. 101 (the principal Act); 34 & 35 Vict. c. 38; 38 & 39 Vict. c. 74; 45 Vict. c. 11.

vision for domestic water supply,⁹² the assessment is levied by the Local Authority along with, but as a separate assessment from, any other assessment which they may be entitled to levy, *i.e.*, the police assessment, or (if there be none such or where the Local Authority is a Parochial Board) the assessment for the relief of the poor, or an assessment laid on in like manner thereto (Act 1867, sect. 95). The value for this purpose of certain subjects (canals and railways apart from buildings used in connection therewith; underground water and gas pipes and works; woodland, arable, meadow, pasture, or other land used for agricultural purposes; mines, minerals, and quarries⁹³) is taken at the nearest aggregate sum of pounds sterling to one-fourth of the entry in the valuation roll (*ibid.*).⁹⁴ A special drainage assessment may be imposed under the same rules (sects. 93-5).

In small burghs, and in parishes.

In other cases—*i.e.*, where the area is a burgh with a population of less than 10,000 and not having a local Act for police purposes or having one which does not sufficiently provide for domestic water supply, or is a parish, so far as not situated out-with the district of the Parochial Board, the same rules apply, with the following modifications. The classification of subjects extends only to cases where the Local Authority are a Town Council, Police Commissioners (or Trustees), or a Parochial Board having a district including a burgh or police burgh. And a special water supply rate, if resolved on, is levied under the same rules (sects. 89, 94).⁹⁵

2. *Similar Burdens.*

Registration of births, &c.

The expenses connected with the registration of births, deaths, and marriages⁹⁶ are defrayed, so far as not otherwise provided for, by an assessment made and levied in the same manner as and along with but separate from the poor-rate (where such a rate exists) in non-burghal parishes, and where it does not exist according as the sheriff shall direct (sect. 50); and by assessment on the real rent of lands and heritages within burgh (sect. 66).

Burial grounds.

The assessment leviable under the Burial Grounds Act, 1855,⁹⁷ whether laid on by the Town Council in burghs, or by

⁹² 30 & 31 Vict. c. 101, sect. 95, amended by 34 & 35 Vict. c. 38, sect. 1.

⁹³ *Quoad* domestic water supply rating manufactories in burgh have the same privilege—34 & 35 Vict. c. 38, sect. 1.

⁹⁴ As to the maximum rate per pound see *ibid.* and 34 & 35 Vict. c. 38, sect. 1.

⁹⁵ See the alternative powers in police

burghs, as to drainage and water supply, in the Lindsay Act, 25 & 26 Vict. c. 101, sects. 182 *seqq.*, and *Edmonstone v. Kilsyth Comrs.*, 1882, 9 R. 917.

⁹⁶ 17 & 18 Vict. c. 80; amended by 18 & 19 Vict. 29; 23 & 24 Vict. c. 85; 42 & 43 Vict. c. 8.

⁹⁷ 18 & 19 Vict. c. 68.

the Parochial Board elsewhere, is to be raised 'in the same way as' that which may be in force for the time being for the relief of the 'poor within the parish' (sect. 26).⁹⁸

The expenses incurred under the Smoke Nuisance Acts are defrayed by means of a rate leviab^le along with and in like manner as the poor-rate.⁹⁹ Smoke nuisance.

Bakehouses are regulated by the Local Authority which administers the Public Health Act at the charge of the rate which it is entitled to raise.¹⁰⁰ Bakehouses.

The expenses—not exceeding a penny in the pound of yearly rent—which may be raised under the Public Libraries Acts,¹⁰¹ if they are adopted by the householders,¹⁰² are payable out of the Police Rate, where that rate is levied in a burgh or populous place, and in parishes elsewhere out of a rate leviab^le in the same way as the poor-rate (sect. 5). Public libraries.

There is a long series of statutes which deal with lodging-houses for the labouring classes,¹⁰³ dwellings for artizans and labourers,¹⁰⁴ the improvement of these dwellings,¹⁰⁵ and the housing of the working classes.¹⁰⁶ It is enough to say that the administration of these Acts lies with the Local Authority under the Public Health Acts, and that the necessary funds are levied along with, but as a separate assessment from, the Public Health Assessment.¹⁰⁷ Housing of working classes.

Any expenses incurred by a Local Authority in the execution of the Rivers Pollution Act, 1876,¹⁰⁸ are payable as if they were expenses properly incurred under the Public Health Act. Rivers pollution.

The local rate under the Public Parks Act, 1878,¹⁰⁹ is levied and recovered along with, but as a separate assessment from, the public health rate. Public parks.

C. COUNTY AND SIMILAR BURGH ASSESSMENTS.

The next set of public burdens are those in regard to which the county is the typical area, and the burgh, as far as possible, follows the type. The leading assessment in each case is the

⁹⁸ For fees of lairs and interment see sects. 18, 24, and 44 & 45 Vict. c. 27.

⁹⁹ 20 & 21 Vict. c. 73, sects. 12-14; 24 & 25 Vict. c. 17; 28 & 29 Vict. c. 102.

¹⁰⁰ 26 & 27 Vict. c. 40, sect. 7. The P.H. Act comes in place of the Nuisance Removal Acts there referred to.

¹⁰¹ 30 & 31 Vict. c. 37, amended by 34 & 35 Vict. c. 59; 40 & 41 Vict. c. 54.

¹⁰² Sect. 3 of first Act amended by the last.

¹⁰³ 14 & 15 Vict. c. 34; 29 & 30 Vict.

c. 28; 30 & 31 Vict. c. 28; adoptable in Scotland (48 & 49 Vict. c. 72, sect. 16).

¹⁰⁴ 31 & 32 Vict. c. 130; 42 & 43 Vict. c. 64; 43 Vict. c. 8; 45 & 46 Vict. c. 54, part ii.

¹⁰⁵ 38 & 39 Vict. c. 49; 43 Vict. c. 2 (Scotch Acts).

¹⁰⁶ 48 & 49 Vict. c. 72.

¹⁰⁷ See 38 & 39 Vict. c. 49, sect. 20.

¹⁰⁸ 39 & 40 Vict. c. 75, sect. 8.

¹⁰⁹ 41 & 42 Vict. c. 8, sect. 13.

police rate. Most of the county expenses, other than those involved in the support of the constabulary, are defrayed out of the county general assessment. In burghs, the police rate provides for these miscellaneous expenses.

1. *Police Assessment.*

(a) *In Counties.*

County police. In counties and in such burghs as are, for the purposes of the Act, consolidated with them, the County Police Act, 1857,¹¹⁰ throws the burden of providing and maintaining a constabulary on all lands and heritages according to their yearly value as established by the valuation roll; 'and the said assessment so to be laid on in each year shall be payable, as for the period from Whitsunday in such year to Whitsunday in the year immediately following, and may be levied either on the proprietor or tenant of all such lands and heritages; but such tenant, in case of his paying such assessment, shall be entitled to deduct the amount from the rent payable by him' (sect. 29).¹¹¹ So that this impost is an owner's burden, leviable from tenants only for facility of collection.¹¹²

(b) *In Burghs.*

Burgh Police: The General Police (or Lindsay) Act of 1862,¹¹³ authorises the general rate. imposition of a general rate called the Police Assessment on 'all occupiers of lands or premises within the burgh according to the valuation made up and completed in terms of' the Valuation Acts, as from 15th May yearly, with a limit of 2s. 6d. or 1s. 6d. in the pound of the gross yearly value, according as the enactments of the statute with respect to water have or have not been adopted (sect. 84). Existing classifications of subjects according to rental may be retained (*ibid.*). The rate may be remitted on the ground of poverty or inability to pay (sect. 88). Owners in place of occupiers are assessed where the premises are let at a rent under four pounds, and a deduction of one-fourth of the assessment is then allowed (sect. 87). Deduction is also allowed for any period during which the premises are not let or occupied for three months consecutively in any one year, and owners as well as occupiers are responsible for the assessment applicable to any period less than a year (sect. 89), though the

¹¹⁰ 20 & 21 Vict. c. 72; amended by 21 & 22 Vict. c. 65.

¹¹¹ This and the subsequent sections deal with deductions, remissions, and recovery.

¹¹² The powers are carried over into the Sheriff Court-houses Act, 23 & 24

Vict. c. 79, sects. 29-34.

¹¹³ 25 & 26 Vict. c. 101. The older Act, 13 & 14 Vict. c. 33, is left standing where it was adopted before 1862. As to the correlative franchise, see Rankine, *Landownership*, 187.

premises had never been vacant during the year.¹¹⁴ A classification of premises similar to that which is contained in the Public Health Act¹¹⁵ is also prescribed, with the exception that mines, minerals, quarries, and manufactories are only classified with respect to water supply (sect. 90).¹¹⁶

Of the special assessments authorised by the Act, the special rate leviable for meeting claims for damages caused by riot is laid on occupiers), or the Commissioners may resort to the Police Rate (sect. 85). The General Improvement Rate is imposed on owners and occupiers in equal proportions, and may be levied in that form or wholly from the occupier, subject to right to deduct from his rent the owner's proportion (sect. 102). The 'Private Improvement Assessment' is imposed on the owner or occupier, as the case may be, who has failed or delayed to execute work required of him under the Act, or has caused the Commissioners expense (sect. 103).¹¹⁷ The Gas Contingent Guarantee Rate is similar in all respects to the Police Rate.¹¹⁸

2. *County General Assessment.*¹¹⁹

The incidence of this rate is precisely the same as that of the County Police Assessment; tenants may be assessed but they have right of total relief by deduction of rent (sect. 4).

3. *Burdens thrown on the Police or General County Assessment.*

The expenses connected with the administration of the following statutes are thrown on the Police or County General Assessment in counties, and on the Police Rate, or, it may be, on any other funds in the hands of the Local Authority in burghs: viz., the Dogs Act, 1871;¹²⁰ the Pedlars Act,¹²¹ and the Petroleum Act¹²² of the same year; the Explosives Act, 1875;¹²³ the Sale of Food and Drugs Acts, 1875 and 1879;¹²⁴ the Prisons¹²⁵ and Reformatories¹²⁶ Acts, and the Weights and Measures Act, 1878.¹²⁷

¹¹⁴ Paisley v. Marshall, 1881, 8 R. 480.

¹¹⁵ *Supra*, p. 562.

¹¹⁶ See Edmonstone v. Kilsyth Comrs., 1882, 9 R. 917, *supra*, p. 562.

¹¹⁷ Mode of collection (sects. 107-8).

¹¹⁸ 39 & 40 Vict. c. 49, sect. 39.

¹¹⁹ 31 & 32 Vict. c. 82.

¹²⁰ 34 & 35 Vict. c. 56, sects. 1, 5, and Sched.

¹²¹ 34 & 35 Vict. c. 96, sects. 20, 21, and Sched. I; 44 & 45 Vict. c. 45.

¹²² 34 & 35 Vict. c. 105, sects. 8, 11, 12; 42 & 43 Vict. c. 47; 44 & 45 Vict. c. 67. As to the harbour authority in

this and the next Act see 24 & 25 Vict. c. 47; 25 & 26 Vict. c. 69; 26 & 27 Vict. c. 81; 29 & 30 Vict. cc. 30, 72.

¹²³ 38 & 39 Vict. c. 17.

¹²⁴ 38 & 39 Vict. c. 63, sects. 11, 33; 42 & 43 Vict. c. 30.

¹²⁵ 40 & 41 Vict. c. 53, sects. 18-21, 26, 43, 55; 41 & 42 Vict. c. 63.

¹²⁶ 40 & 41 Vict. c. 53, sect. 67; 17 & 18 Vict. c. 86; 29 & 30 Vict. c. 118; 43 & 44 Vict. c. 18; 41 & 42 Vict. c. 40, and Acts there referred to.

¹²⁷ 41 & 42 Vict. c. 49.

4. *Contagious Diseases (Animals) Acts, 1878-1886.*¹²⁸

Incidence.

The local rate under these statutes is payable to the Commissioners of Supply on behalf of the Local Authority in counties, and to the Local Authority itself in burghs, one-half by the proprietor and one-half by the tenant, or wholly by either with relief against the other for half, according to the real rent of lands and heritages as appearing in the valuation roll (sect. 70).¹²⁹ The Local Authority in parliamentary burghs consists of the Magistrates and Town Council. In counties (excluding such burghs) it consists partly of members¹³⁰ elected by a meeting of occupiers of agricultural subjects valued at £100 a-year, and of owners and occupiers of such subjects valued at £50 and under £100 a-year; or, failing an election, nominated by the Lord Lieutenant from among persons of that description (sect. 69, sched. vii.): These Authorities act by committees.¹³¹

Rules as to disposal and movement of live stock.

The pecuniary liability thus thrown on tenants is frequently the smallest part of the burden which the Act for the common good throws on their shoulders. The restrictions which the Act and under it the Privy Council impose on the disposal and movement of live stock must be sought in the statute itself. They

Intimation of disease.

may, however, be briefly summarised as follows:—It is the duty of every person having in his possession or under his charge an animal affected with ‘disease’ (*i.e.*, cattle-plague, contagious pleuro-pneumonia, foot-and-mouth disease, sheep-pox or sheep-scab), to separate it from the other stock, and with all practicable speed to give notice to a constable¹³² (sect. 31). If an inspector under the Act finds that cattle-plague exists or has within

Cattle-plague.

ten days existed in any place, he so declares, serves a notice thereof on the occupier, and thereby constitutes the place (cowshed, field, &c.) with contiguous lands and buildings in the same occupation a place infected with cattle-plague. He may serve a like notice on occupiers of premises within a mile of that place, or any of them, with the same result. The Privy Council may confirm the declaration and prescribe the limits of the infected place, or refuse so to do (sect. 10). And it may make the declaration on receipt of any evidence whatsoever (sect. 11);

¹²⁸ 41 & 42 Vict. c. 74; 47 & 48 Vict. cc. 13, 47; 49 & 50 Vict. c. 32.

¹²⁹ The last Act [sect. 9 (3 and 7)] throws the expenses incurred under sect. 34 of the principal Act on the Public Health Rate.

¹³⁰ 4-15, and as many as those nominated by the Commissioners of Supply.

There are also rules subject to which by-laws may be made for retiring, &c.

¹³¹ Sched. vi. gives the rules.

¹³² *Robertson v. Perthshire L.A.*, 1883, 10 R. (Just.) 68 (owner of cows bowed out). See *Huggins v. Ward*, L.R. 8 Q.B. 521; and *Nichols v. Hall*, L.R. 8 C.P. 322, on a similar provision in the Act of 1869

constitute an infected area (sect. 12) or infected circle;¹³³ alter their limits (sect. 13); or declare them free from plague (sect. 14). It shall cause to be slaughtered all animals affected or having been in the same shed, stable, herd, flock, or in contact with them, and may cause to be slaughtered all animals suspected of plague, or being in an infected place, and all animals being in such parts of an infected area as are not comprised in such a place. The compensation (paid out of money provided by Parliament) is one-half of an infected animal's value before infection, but not more than £20, and the whole value of an animal not infected before it was slaughtered, but not more than £40 (sect. 16). Similar rules are laid down for the stamping out of pleuro-pneumonia, with the exceptions that the limit of time is fifty-six days; that the Local Authority (subject to control) takes the management; and that the compensation for an infected animal is three-fourths of its value, and not more than £30 (sects. 16-21). In the case of foot-and-mouth disease the limit of time is ten days; there are variations in the period after which a clean bill of health can be given; and there are no provisions for slaughter (sects. 23-26).¹³⁴ The Privy Council is empowered to make orders regarding animals affected with either of the last two maladies, and found in market, lair, transit, wharf, slaughterhouse, common-land, or (generally) out of control of their owner, and regarding the consequences of being so found (sect. 27). It may make general orders with regard to other maladies putting them on the same footing as these (sect. 28); or directing slaughter in other cases besides those mentioned above.¹³⁵ An animal liable to be slaughtered may be reserved for observation and treatment, subject to compensation as above. When slaughter takes place the carcase is buried, sold, or otherwise disposed of according to circumstances, by the Privy Council or Local Authority (sect. 30).¹³⁶ The powers conferred on the Privy Council in regard to the issuing of General Orders are very extensive, especially with regard to the movement of animals (sects. 32, 34, 58);¹³⁷ and the duties and powers of the Local Authority are correspondingly wide (sects. 37-45).¹³⁸ These powers of the

Pleuro-pneumonia.

Foot-and-mouth disease.

Orders of Privy Council.

¹³³ 49 & 50 Vict. c. 32, sect. 2.

¹³⁴ Sects. 20 and 26 are amended by 49 & 50 Vict. c. 32, sect. 4; sects. 17 and 23 by sect. 3 of the same Act; and sect. 20 by sect. 5.

¹³⁵ 49 & 50 Vict. c. 32, sect. 6, repealing sect. 29 of the principal Act.

¹³⁶ The directions as to place of burial,

insurance, excess of price over compensation, &c., are very minute (*ibid.*).

¹³⁷ Sect. 32 is amended by 49 & 50 Vict. c. 32, sect. 8. All the subsisting orders are dated in 1884 and later years.

¹³⁸ Sect. 39 is amended, last Act, sect. 10.

Privy Council may be partly delegated to Local Authorities,¹³⁹ and are partly transferred to the Board of Supervision.¹⁴⁰ The functions of the police (sect. 50) and inspectors (sect. 51) are defined; and provision is made for dealing with offences against the Act (sects. 60-66, 74).¹⁴¹

5. *Roads and Bridges Act*.¹⁴²

In burghs.

The assessment in burghs is (1) on occupiers, so far as it is in lieu of causeway maill (sect. 34); and (2) on proprietors and tenants or occupiers, one-half on each, or on proprietors only, where the names of the tenants or occupiers do not appear on the valuation roll (with relief), so far as the maintenance and repair of streets and roads (sect. 54)¹⁴³ and the construction of new roads and bridges (sect. 58) are concerned. The whole of this second assessment may be levied from other occupiers or tenants (with relief); and poverty is the only excuse for non-payment, and that only where the rent is under £4 a-year (sect. 86). In counties, tenants and occupiers have no responsibility for the expense of new roads and bridges (*ibid.*), but the expenses of managing, maintaining, and repairing the roads and bridges within or partly within the county, a road district thereof, or a parish (as the case may be), and a fair contribution to the general expenses of the system are met by an assessment at a uniform rate laid half on the proprietor¹⁴⁴ and half on the tenant and occupier of lands and heritages. If the rated premises stand at £4 or less on the roll, the whole rate is levied from the landlord, reserving his relief (sect. 52). Poverty of occupiers of such premises is the only ground of exemption from liability for the rate (sect. 84). The year runs from Whitsunday to Whitsunday (sect. 82), and provision is made for relieving outgoing tenants of the proportion of rate effeiring to that part of a broken year during which they did not possess (sect. 52). Neither in burgh nor in county is a tenant or occupier assessable for the payment of debt (sect. 74).

In counties.

Voting for
Road Trust.

The correlative privilege of tenants is in burghs the municipal franchise, inferring representation through the Local Authority—

¹³⁹ *Ibid.* sect. 7.

¹⁴⁰ *Ibid.* sect. 9.

¹⁴¹ Rules are added in schedules applicable to pleuro, foot-and-mouth disease, foreign animals (as to which see also sects. 27, 35, 38, 52).

¹⁴² 41 & 42 Vict. c. 51.

¹⁴³ As to retaining old modes and assessment, see sect. 55.

¹⁴⁴ Though the premises are unoccupied—*Russell v. Lanarkshire Middle Ward Trs.*, 1884, 12 R. 298. The rate is to be equal per pound on owners and occupiers, distinguishing between this burden and poor-rates (*Galloway, supra*, p. 558)—*Macdonald v. Armour*, 1887, 24 Sc.L.R. 324.

the Town Council or Police Commissioners (sects. 3, 11); and, in counties, the right of the ratepayers in each parish once in every three years to elect a part of the Road Trust corresponding to the population of the parish (sect. 12).

A person¹⁴⁵ causing extraordinary expenses to a Local Authority through damage done to a highway by the carriage of 'excessive weight,' or by 'extraordinary traffic,' is liable for damages summarily assessed (sect. 57). The liability is incurred not through an unusual amount of traffic of the description usual in the locality and on the particular road (as in building an ordinary dwelling-house,¹⁴⁶ or in quarrying, so long as usual loads only are carried,¹⁴⁷) but by conveying goods (though of the usual sort, such as manure or grain) in extraordinary loads or by means of traction engines, or in modes not contemplated in the making or maintaining of the particular road which is damaged.¹⁴⁸

Extraordinary traffic.

6. *Miscellaneous.*

The remaining burdens which fall on burgh or county may be briefly dismissed. The expenses connected with militia stores,¹⁴⁹ and providing, altering, repairing, and furnishing district asylums¹⁵⁰ are thrown, in burghs, one-half on owners and one-half on tenants or occupiers, or the whole on the latter with right of relief as to half, with remissions on the ground of poverty where the value is £5 a-year or under.¹⁵¹ The expense of the valuation roll may be thrown on the Treasury under certain conditions.¹⁵² If this is not done it may be levied with the poor-rate, or on proprietors or occupiers equally, or along with any assessment laid on real rent.¹⁵³ The expense of registration of voters (1) in burghs represented before 1868 is met in the same way;¹⁵⁴ (2) in new burghs it is thrown on the police rate so far as payable for premises within the burgh;¹⁵⁵ and (3) in counties it is levied along with any county rate.¹⁵⁶

¹⁴⁵ Not being a body of Road Trustees (sect. 3)—Perthshire Road Trs. v. Forfarshire Road Trs., 1884, 11 R. 1070.

¹⁴⁶ Pickering Board v. Barry, 8 Q.B.D. 59; Raglan Board v. Monmouth Steam Co., 46 J.P. 498.

¹⁴⁷ Wallington v. Hoskins, 6 Q.B.D. 206.

¹⁴⁸ L. Aveland v. Lucas, 6 C.P.D. 211, 351; The Queen v. Ellis, 8 Q.B.D. 466. The legality of using locomotives is irrelevant; and see obs. on measure of damages, L. Aveland, *supra*.

¹⁴⁹ 17 & 18 Vict. c. 106, sect. 37.

¹⁵⁰ 20 & 21 Vict. c. 71, sect. 54; 2 & 3

Vict. c. 42, sect. 40; 23 & 24 Vict. c. 105, sect. 1.

¹⁵¹ 40 & 41 Vict. c. 53, sect. 63.

¹⁵² 20 & 21 Vict. c. 53, sects. 1, 3.

¹⁵³ 17 & 18 Vict. c. 91, sect. 18; along with expense of printing the roll—30 & 31 Vict. c. 80, sect. 10.

¹⁵⁴ 19 & 20 Vict. c. 58, sect. 42.

¹⁵⁵ 31 & 32 Vict. c. 48, sects. 46-48.

¹⁵⁶ 24 & 25 Vict. c. 83, sect. 41; 31 & 32 Vict. c. 48, sect. 42. As to salmon fishery assessment see 25 & 26 Vict. c. 97, sect. 23; 31 & 32 Vict. c. 123, sect. 14.

D. IMPERIAL TAXES.

The incidence and operation of the Inhabited House Duty and of the Income Tax (Schedule B) have been so fully discussed elsewhere,¹⁵⁷ that nothing need be added here, except a reference to the most recent cases.¹⁵⁸

III. RELIEF BY AGREEMENT.

Only *inter se*.

Such being the incidence of these public burdens, it has appeared that in many cases the immediate is, or may be, different from the ultimate liability, the overpaying party being entitled to indemnify himself to the extent of the overpayment out of, or by addition to, the rent, as the case may be.¹⁵⁹ But there is nothing to prevent the parties to a contract of lease from contracting in it or otherwise for a disturbance *inter se* of the normal state of liability for rates or taxes. They do not thereby alter their liability—imposed by statute—in a question with the rating or taxing authority; but *inter se* they have rights or obligations of relief.¹⁶⁰

Contents of receipts.

Care should then be taken to preserve evidence of the mode in which payment to the authorities was actually made; and also to discriminate in receipts for rent or in rental books and similar documents between allowances by way of relief and cash paid down. Thus it was decided in an early case that where the tenant had a clause of relief of all public burdens and yet paid certain of these and his rent subject to no deduction so far as appeared *ex facie* of the receipts, the only mode of proving that the landlord had received full payment of the rent was by his writ or oath.¹⁶¹

Interpretation.

The interpretation of such clauses of relief has frequently given rise to important and subtle questions between superior and vassal.¹⁶² But very few disputes have arisen between landlord

¹⁵⁷ Rankine, *Landownership*, 694, 705, 983.

¹⁵⁸ *Inhabited House Duty*—Nisbet v. M'Innes, 1884, 11 R. 1095; Clerk v. British Linen Co., 1885, 12 R. 1133; Smiles v. Croke, 1886, 13 R. 730; Weguellin v. Wayall, 14 Q.B.D. 838—all on the 13th section of the Act of 1878. *Income Tax*—Brown v. Watt 1886, 13 R. 590 (losses in farming, Schedule B, cannot be set against profits on trade, Schedule D, though the farm was taken as accessory to the trade). Clerk v. Dumfries Comrs., 1880, 7 R. 1157 (as to police

stations), is disapproved in *Coomber v. Berks Justices*, 9 App. Cas. 61. Other cases of less interest to occupiers are to be found in 13 Q.B.D. 9; 8 App. Cas. 891.

¹⁵⁹ As to stipend see 2 Connell, *Tithes*, 95, and cases there. See a case in which an obvious mistake was rectified—Donald v. Leitch, 1886, 13 R. 790.

¹⁶⁰ See the old Act, 1597, c. 281; 2 Ross, *Lect.* 495.

¹⁶¹ Veatch v. Paterson, 1664, M. 11383.

¹⁶² See authorities collected in Rankine, *Landownership*, 715 *seqq.*

and tenant. Where an obligation on a tenant to pay all the public burdens due in respect of the subjects let was admitted, the income tax prestable by the landlord was held not to be included in that category.¹⁶³ On the principle '*noscitur a sociis*' an obligation to pay rent 'free of cesses, ministers' stipends, poor's 'money, and all other public burdens and *other deductions* whatsoever' was held not to throw the payment of feu-duties or ground annuals on the tenant.¹⁶⁴ A tenant, bound to pay along with his rent 'the minister's stipend . . . imposed or to be imposed during the currency of the tack,' paid stipend as fixed by an interim locality prior to his entry. It turned out that there was overpayment, and his landlord got credit for that in a question with the other heritors. The tenant claimed repetition of the overpayments and obtained it, on the ground that he had paid more than was due by him; that the landlord must be taken to have been *lucratus* by the rectification of liability; and that the rent was not proved to have been fixed with special reference to the interim locality.¹⁶⁵

¹⁶³ *Wilson v. Holmes*, 1828, 6 S. 551 M. 15338.
(writ or oath required).

¹⁶⁵ *Crawford v. Boyle*, 1849, 11 D. 714.

¹⁶⁴ *York Buildings Co. v. Grant*, 1737,

APPENDIX
OF
STATUTES AND FORMS.

APPENDIX.

No. I.

20 & 21 VICTORIA, c. 26.

An Act to provide for the Registration of Long Leases in Scotland, and Assignations thereof.—[10th August 1857.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. From and after the passing of this Act, it shall be lawful to record in the General Register of Sasines in Scotland, or in the particular Register of Sasines for the district in which the lands and heritages leased are situated, probative leases, whether executed before or after the passing of this Act, for a period of thirty-one years, and for any greater number of years that shall be stipulated, of lands and heritages in Scotland other than lands and heritages held by burgage tenure, and to record in the several Burgh Registers of Sasines probative leases for the period foresaid of lands and heritages within the burgh for which such register is kept, and held by burgage tenure, and to record respectively in the register in which any such lease as aforesaid shall have been registered the assignations, and assignations in security of such lease, and translations thereof, all hereinafter mentioned.

Long leases, and assignations thereof, registerable in Register of Sasines.

2. Leases registerable under this Act, and valid and binding as in a question with the granters thereof, which shall have been duly recorded, as herein provided, at or subsequent to the date of entry therein stipulated, shall, by virtue of such registration, be effectual against any singular successor in the lands and heritages thereby let, whose infestment is posterior in date to the date of such registration: Provided always, that, except for the purposes of this Act, it shall not be necessary to record any such lease as aforesaid, but that all such leases which would, under the existing law prior to the passing of this Act, have been valid and effectual against any such singular successor as aforesaid, shall, though not recorded, be valid and effectual against such singular successor, as well as against the granters of the said leases.

Recorded leases effectual against singular successors in the lands let.

3. When any such lease as aforesaid shall have been recorded as herein provided, it shall be lawful for the party in right of such lease,

Assignations of recorded leases.

and whose right is recorded in terms of this Act, but in accordance always with the conditions and stipulations of such lease, and not otherwise, to assign the same, in whole or in part, by assignation, in the form as nearly as may be of the Schedule (A) to this Act annexed; and the recording of such assignation shall fully and effectually vest the assignee with the right of the granter thereof in and to such lease to the extent assigned: Provided always, that such assignation shall be without prejudice to the right of hypothec, or other rights of the landlord.

Assignations in security.

4. It shall be lawful for the party in right of any such lease recorded as aforesaid, and whose right thereto is recorded in terms of this Act, but in accordance always with the conditions and stipulations of such lease, and not otherwise, to assign the same, in whole or in part, in security for the payment of borrowed money, or of annuities, or of provisions to wives or children, or in security of cash credits or other legal debt or obligation, in the form as near as may be of the Schedule (B) to this Act annexed; and the recording of such assignation in security shall complete the right thereunder; and such assignation in security so recorded shall constitute a real security over such lease to the extent assigned.

Where party presenting for registration not original lessee or assignee.

5. Where the party in right of any such lease or assignation in security as aforesaid is not the original lessee in such lease, or the original assignee in such assignation in security, he shall, before presenting such lease or assignation in security for registration, expedite an instrument, under the hand of a notary-public, in the form as nearly as may be of the Schedule (C) to this Act annexed; and the keeper of the register, on such notarial instrument being produced to him, but not otherwise, shall thereupon record such lease or assignation in security, together with the said instrument.

Translation of assignations in security.

6. All such assignations in security as aforesaid shall, when recorded, be transferable, in whole or in part, by translation, in the form as nearly as may be of the Schedule (D) to this Act annexed; and the recording of such translation shall fully and effectually vest the party in whose favour it was granted with the right of the granter thereof in such assignation in security to the extent assigned; and the creditor or party in right of such assignation in security, without prejudice to the exercise of any power of sale therein contained, shall be entitled in default of payment of the capital sum for which such assignation in security has been granted, or of a term's interest thereof, or of a term's annuity, for six months after such capital sum or term's interest or annuity shall have fallen due, to apply to the sheriff for a warrant to enter on possession of the lands and heritages leased; and the sheriff, after intimation to the lessee for the time being, and to the landlord, shall, if he see cause, grant such warrant, which shall be a sufficient title for such creditor or party to enter into possession of such lands and heritages, and to uplift the rents from any subtenants therein, and to sublet the same, as freely and to the like effect as the lessee might have done: Provided always, that no such creditor or party, unless and until he enter into possession as aforesaid, shall be personally liable to the landlord in any of the obligations and prestations of the lease.

Creditor's entry to possession in default of payment.

Heir may complete title by writ of acknowledgment.

7. It shall be competent for the heir of any party who shall have died vested in right of any such lease or assignation in security, recorded as aforesaid, to make up his title thereto by a writ of acknowledgment

from the proprietor infest in the lands and heritages leased by such lease, or from the party appearing on the register as in absolute right of such lease of or over which such assignation in security has been granted, respectively, in the form as nearly as may be of the Schedule (E) to this Act annexed; and the recording of such writ in the register in which such lease or assignation in security is registered shall complete the title of such heir to such lease or assignation in security aforesaid: Provided always, that no defect in the title of the proprietor or party granter of such writ shall affect the right or title of such heir.

8. It shall be competent to the heir who shall have been served by general or special service, or to the general disponee of any party who shall have died fully vested in right of any such lease or assignation in security, recorded as aforesaid, to expedite a notarial instrument in the form as nearly as may be of the Schedule (F) to this Act annexed; and the recording of such instrument in the register in which such lease is recorded shall complete the title of such heir or disponee to such lease or assignation in security.

Heir of disponee may complete title by recording notarial instrument.

9. Where any assignation, assignation in security, or translation granted in pursuance of this Act shall not have been registered as aforesaid in the lifetime of the grantee in such writ respectively, it shall be competent to the heir or general disponee of such grantee to make up his title by expediting an instrument under the hand of a notary-public in the form, as nearly as may be, of the Schedule (F) to this Act annexed; and the keeper of the register, on such notarial instrument being presented to him, but not otherwise, shall thereupon record such assignation, assignation in security, or translation, together with the said instrument.

Where assignee has died without recording assignation, mode of making up title.

10. When an adjudication of any such lease or assignation in security recorded as aforesaid shall have been obtained against the party vested in the right thereof respectively, or against the heir of such party, the recording of the abbreviate of adjudication in the register in which the lease is recorded shall complete the right of the adjudger to such lease or assignation in security.

Adjudgers to complete right by recording abbreviate.

11. It shall be lawful for the trustee on the sequestrated estate of any party in right of any such lease or assignation in security as aforesaid to expedite a notarial instrument in the form as nearly as may be of the Schedule (F) to this Act annexed; and the recording of such instrument in the register in which such lease is recorded shall complete the right of such trustee to such lease or assignation in security.

Trustees on sequestrated estate may be entered on register.

12. All such leases executed after the passing of this Act, and all assignations, assignations in security of any such lease recorded as aforesaid, and translations thereof, and all adjudications of such leases recorded as aforesaid, or assignations in security, shall in competition be preferable according to their dates of recording.

Preferences regulated by date of recording transfer.

13. On the production to the keeper of the register of a renunciation of any such lease as aforesaid recorded therein, or of a discharge of any such assignation in security, as aforesaid therein recorded, by or on behalf of the party appearing on the register as in right of such lease or assignation in security, which renunciation or discharge may be in the form of the Schedules (G) and (H) respectively to this Act annexed, and may be endorsed on such lease or assignation in security, he shall forthwith duly record the same.

Renunciations and discharges to be recorded.

14. On the production to any such keeper of an extract of a

Entry of decree of reduction.

decree of reduction of any such lease, assignation, assignation in security, translation, adjudication, instrument, discharge, or renunciation recorded in the register of which he is the keeper, he shall forthwith duly record the same.

Mode of
registering.

15. Leases, assignations, assignments in security, translations, adjudications, instruments, discharges, renunciations, and other writs, duly presented for registration in pursuance of this Act, shall be forthwith shortly entered in the minute-book of the register in common form, and shall, with all due dispatch, be fully registered in the register book, and thereafter redelivered to the parties, with certificates of due registration thereon, which shall be probative of such registration, such certificates specifying the date of presentation, and the book and folio in which the ingrossment has been made, and being subscribed by the keeper of the register; and the date of entry in the minute-book shall be held to be the date of registration; and extracts of all such writs registered in pursuance of this Act shall make faith in all cases in like manner as the writs registered, except where the writs so registered are offered to be improven.

Extracts to
make faith as
writs re-
gistered.

Registration
equivalent to
possession.

16. The registration of all such leases, assignations, assignments in security, translations, adjudications, writs of acknowledgment, and notarial instruments as aforesaid, in manner herein provided, shall complete the right under the same respectively, to the effect of establishing a preference in virtue thereof, as effectually as if the grantee, or party in his right, had entered into the actual possession of the subjects leased under such writs respectively at the date of registration thereof.

Leases, with
obligation to
renew, re-
gisterable.

17. Leases containing an obligation upon the granter to renew the same from time to time at fixed periods, or upon the termination of a life or lives, or otherwise, shall be deemed leases within the meaning of this Act, and registerable as such, provided such leases shall by the terms of such obligation be renewable from time to time so as to endure for a period of thirty-one years or upwards.

No lease
executed after
date of Act to
be register-
able where
name of lands
and bound-
aries not
given.

18. No lease of lands and heritages other than subjects held by burgage tenure executed after the passing of this Act, unless where the same shall have been executed in terms of an obligation to renew contained in a lease renewable as aforesaid, and of date prior to this Act, shall be held to fall within the same or to be registerable thereunder, unless the name of the lands of which the subjects let consist or form a part shall be set forth in such lease; and no such lease of such lands and heritages as aforesaid, except where the same consist of mines or minerals, shall be held to fall within this Act or to be registerable thereunder, unless the extent of the land let shall be set forth in such lease, and shall not exceed fifty acres.

Extracts
registerable
where leases
recorded in
Court of
Session or
Sheriff Court
Books prior
to Act.

19. Where any such lease as aforesaid registerable under this Act shall, before the passing thereof, have been recorded in the Books of Council and Session, or in the Books of any Sheriff or Burgh Court, the production to the keeper of the register of an extract of such lease shall be a sufficient warrant for him to record the same, and he shall thereupon duly record it, and the recording thereof shall be as valid and effectual as if the original lease had been presented to him.

Clauses in
schedules to
be held to
import and to

20. The several clauses in the schedules to this Act annexed shall be held to import such and the like meaning and to have such and the like effect as is declared by the Act of the tenth and eleventh of Queen

Victoria, chapter fifty, sections second and third, to belong to the have effect corresponding clauses in the schedule to the said recited Act annexed, as declared by 10 & 11 and the procedure thereby prescribed for a sale under a bond and Vict. c. 50. disposition in security shall be applicable to a sale of any such lease as aforesaid under any such assignation in security as is hereinbefore mentioned.

21. This Act may be cited for all purposes as 'The Registration Short title. of Leases (Scotland) Act, 1857.'

SCHEDULE (A).

Form of Assignation of Lease.

I, *A.B.* [*designation*], in consideration of the sum of now paid to me [*or otherwise, as the case may be*], assign to *C.D.* [*designation*], a lease, dated , and recorded in the Register of Sasines at , of date , granted by *E.F.* [*designation*], in my favour [*or if not in assigner's favour, name and design grantee*], of [*shortly mention subjects*] in the parish of and county of [and (*when the assigner is not the grantee in the lease*) my title to which is recorded in the said register, of date], [but (*where the lease is assigned in part only*) in so far only as regards the following portion of the subjects leased; viz. (*specify particularly the portion*),] with entry as at (*term of entry*). And [*where sublease*] I assign the rents from [*term*]; and I grant warrandice; and I bind myself to free and relieve the said *C.D.* of all rents and burdens due to the landlord or others at and prior to the term of entry in respect of said lease; and I consent to registration for preservation and execution.

[*Testing-clause in common form.*]

SCHEDULE (B).

Form of Bond and Assignation in Security.

I, *A.B.* [*designation*], bind myself, my heirs and executors, without the necessity of discussing them in their order, to make payment, at the term of [*date and place of payment*], to *C.D.* [*designation*] or his heirs, executors, or assignees, of the sum of , being money borrowed by me from him [*or as a provision to the said C.D., or of the yearly annuity of* during his lifetime, as the case may be], with the interest of the said capital sum at the rate of per cent. per annum, payable by equal portions half-yearly at Whitsunday and Martinmas, beginning the first payment at . And, in security of the personal obligation before written, I assign to the said *C.D.* and his foresaids, heritably but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, a lease of [*shortly mention subjects leased*] in the parish of and county of , which lease was granted by *E.F.* [*designation*], of date , and recorded [*insert register, with date of recording*], and [*where cedent not the original lessee*] my title to which is registered therein [*date of recording*]; [but (*where only a portion of the subjects are assigned*) in so far only as regards the following portion of the subjects leased; viz. (*specify particularly the portion*)]. And I assign the rents; and I assign the writs; and I grant warrandice; and I reserve power of redemption; and I oblige myself and my foresaids for the

expenses of assigning and discharging this security; and, on default of payment, I grant power of sale; and I consent to registration for preservation and execution.

[*Testing-clause.*]

SCHEDULE (C).

Forms of Notarial Instruments in favour of a Party not the Original Grantee.

No. 1.—*Case of Lease.*

Be it known, that by lease, dated _____, *A.B.* [*designation*] let to *C.D.* [*designation*] that piece of ground [or as the case may be, *shortly describing the property leased*] in the parish of _____ and county of _____, to which lease *E.F.* [*designation*] has made up title by service as eldest son [or as the case may be] and heir of the said *C.D.*, dated [*insert date of service*] before the [*specify the Court before which the heir has been served*], and duly retoured to Chancery [or as the case may be, as general disponent or assignee of the said *C.D.* in virtue of (*here mention the writs or decreets instructing the right, with the dates thereof, and, if recorded, the register, and date of recording*)¹]: Wherefore this instrument is taken by the said *E.F.* in the hands of *G.H.* [*designation of notary-public*], in terms of the Registration of Leases (Scotland) Act, 1857.

[*Testing-clause.*]

¹ If the person in whose favour the instrument is taken is not the heir or disponent of the original grantee, but of one who has acquired right to the lease or assignation in security, here specify shortly the series of titles by which the predecessor acquired the right.

No. 2.—*Case of Assignment in Security.*

Be it known, that by bond and assignation in security of date _____, *C.D.* [*designation*] assigned to *J.K.* [*designation*], in security of a sum of _____ [or as the case may be], a lease granted by *A.B.* [*designation*] of [*shortly describe the subjects leased*], in the parish of _____ and county of _____, which lease is dated _____, and recorded [*register, and date of recording*], to which assignation in security *E.F.* [*designation*] has acquired right as eldest son [or as the case may be] and heir of the said *J.K.*, &c. [as in Form No. 1].

SCHEDULE (D).

Form of Translation of Assignment in Security.

I, *A.B.* [*designation*], in consideration of the sum of _____ now paid to me [or as the case may be], assign and transfer to *C.D.* [*designation*], a bond and assignation in security for the principal sum of _____ [or as the case may be], granted by *E.F.* [*designation*] in my favour [or if not in granter's favour, name and design the party in whose favour granted], dated _____ and recorded [*register and date of recording*] of and over a lease granted by *G.H.* [*designation*] of [*shortly describe subjects leased*], in the parish of _____, and county of _____, which lease is dated _____, and is recorded in the said register of date _____

[and (if the granter is not the assignee in said bond) my title to which bond and assignation in security is recorded in said register (date of recording)], [but (where the translation is partial) only to the extent of (insert sum), and to the effect of giving pari passu preference to the said C.D. over the said lease with me, my heirs and assigns, as regards the remainder of the said principal sum and corresponding interest], with the interest from [date].

[Testing-clause.]

SCHEDULE (E).

Forms of Writs of Acknowledgment.

No. 1.—*Acknowledgment of Heir in Lease.*

I, A.B. [designation], proprietor infeft in the lands of C., by infeftment recorded [register, and date of recording], acknowledge D.E. [designation], as [specify relationship], and heir of the deceased F.G. [designation], to be in right of a lease granted by H.J. [designation], of [shortly mention subjects], in the parish of _____ and county of _____, being a portion of the said lands of C., which lease is dated _____ and recorded [register, and date of recording], and [where the deceased not the original lessee] the title of the said F.G. being recorded in the said register, of date _____.

[Testing-clause.]

No. 2.—*Acknowledgment of Heir of Creditor in Assignment in Security.*

I, A.B. [designation], being in right of a lease granted by C.D. [designation], of [shortly specify subjects], in the parish of _____, and county of _____, which lease is dated _____, and recorded [register, and date of recording], and [where granter not the lessee named in the lease] my title to which is recorded in said register [date of recording], acknowledge E.F. [designation], as [specify relationship], and heir of the deceased G.H. [designation], to be in right of a bond and assignation in security for the sum of _____ [or as the case may be], granted by I.K. [designation], over said lease, which bond and assignation in security is dated _____, and recorded in the said register on [date], and [where the deceased not the original creditor] the title of the said G.H. to which bond and assignation in security is recorded in the said register on [date].

[Testing-clause.]

SCHEDULE (F).

Form of Notarial Instrument in favour of Heir in recorded Lease or Assignation in Security, or of Trustee on Sequestrated Estate.

No. 1.—*Case of Lease.*

Be it known, that by lease dated _____, A.B. [designation], let to C.D. [designation], that piece of ground [or as the case may be, shortly describing the property leased], in the parish of _____

and county of _____, which lease is recorded [*register and date of recording*], and to which *E.F.* [*designation*] has made up title by service as [*specify relationship*], and heir of the said *C.D.*, dated the [*insert date of service*], before the [*specify the Court before which the heir has been served*], and duly retoured to Chancery [*or as the case may be*], as general disponent of the said *C.D.*, or as heir (or general disponent) of *L.M.*, in an assignation by the said *C.D.*, of date _____, or as trustee confirmed on the sequestrated estate of the said *C.D.*, in virtue of (*here mention the writs or decreets, instructing the rights, with the dates thereof, and if recorded the register and date of recording*)). Whereupon this instrument is taken by the said *E.F.*, in the hands of *G.H.* [*designation of notary-public*], in terms of the 'Registration of 'Leases (Scotland) Act, 1857.'

[*Testing-clause.*]

No. 2.—*Case of Assignation in Security.*

Be it known, that by bond and assignation in security, of date _____, *C.D.* [*designation*], assigned to *I.K.* [*designation*], in security of a sum of _____ [*or as the case may be*], a lease granted by *A.B.* [*designation*], of [*shortly describe the subjects leased*], in the parish of _____ and county of _____, dated _____, and recorded [*register, and date of recording*], to which bond and assignation in security *E.F.* [*designation*], has acquired right as [*specify relationship*], and heir of the said *I.K.*, &c. [*as in Form No. 1*].

SCHEDULE (G).

Renunciation of Lease.

I, *A.B.* [*designation*], renounce as from the term of _____ in favour of *C.D.* [*designation*], a lease granted by the said *C.D.* [*or as the case may be*], of [*shortly set forth subjects*], in the parish of _____ and county of _____, which lease is dated _____, and recorded [*register, and date of recording*], and [*where the party renouncing not the original lessee*], my title to which is recorded in the said register on [*date*].

[*Testing-clause.*]

SCHEDULE (H).

Form of Discharge of Bond and Assignation in Security.

I, *A.B.* [*designation*], in consideration of the sum of _____ now paid to me by *C.D.* [*designation*], discharge a bond and assignation in security for the sum of _____, granted by the said *C.D.* in my favour [*or as the case may be*], and which is dated _____, and recorded in the [*reg s er, and date of recording*]; and I declare to be disburdened thereof a lease granted by *E.F.* [*designation*], of [*shortly mention subjects leased*], in the parish of _____ and county of _____, which lease is dated _____, and recorded [*register, and date of recording*].

[*Testing-clause.*]

¹ If granter not original creditor, here state his title, and date of recording the same.

NO. II.

46 & 47 VICTORIA, c. 62.

[AGRICULTURAL HOLDINGS (SCOTLAND) ACT, 1883.]

ARRANGEMENT OF SECTIONS.

Compensation for Improvements.

Section

1. General right of tenant to compensation.

As to Improvements executed before the Commencement of Act.

2. Restriction as to improvements before Act.

As to Improvements executed after the Commencement of Act.

3. Consent of landlord as to improvements in first part of schedule.
4. Notice to landlord as to improvements in second part of schedule.
5. Reservation as to existing and future leases.

Regulations as to Compensation for Improvements.

6. Compensation for improvements.

Procedure.

7. Notice of intended claim.
8. Compensation agreed or settled by reference.
9. Appointment of referee or referees and oversman.
10. Requisition for appointment of oversman by the sheriff.
11. Mode of submission to reference.
12. Power for referee, &c., to require production of documents, administer oaths, &c.
13. Power to proceed in absence.
14. Form of award.
15. Time for award of referee or referees.
16. Reference to and award by oversman.
17. Award to give particulars.
18. Expenses of reference.
19. Day for payment.
20. Appeal to sheriff.
21. Recovery of compensation.
22. Appointment of guardian.
23. Expenses in Sheriff Courts.

Charge of Tenant's Compensation.

24. Power for landlord on paying compensation to obtain charge.
25. Advance made by a company.
26. Duration of charge.

Removing for Non-Payment of Rent.

27. Tenants to be removed only at legal terms.

Notice of Termination of Tenancy.

Section

28. Notice of termination of tenancy.

29. Bequest of lease.

Fixtures.

30. Tenant's property in fixtures, machinery, &c.

Crown Lands.

31. Application of Act to Crown lands.

Ecclesiastical and Charity Lands.

32. Consents in case of glebes, &c.

33. Provision as to limited owners.

General Provisions.

34. Commencement of Act.

35. Application of Act.

36. Avoidance of agreement inconsistent with Act.

37. Right of tenant in respect of improvement purchased from outgoing tenant.

38. Compensation under this Act to be exclusive.

39. Provision as to change of tenancy.

40. General saving of rights.

41. Consents, &c., not subject to statutes regulating execution of deeds.

42. Interpretation.

43. Short title of Act.

SCHEDULE.

An Act for amending the Law relating to Agricultural Holdings in Scotland.—[25th August 1883.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Compensation for Improvements.

General right
of tenant to
compensation.

1. Subject as in this Act mentioned, a tenant who has made on his holding any improvement specified in the schedule hereto, shall, from and after the commencement of this Act, be entitled on quitting his holding at the determination of a tenancy to obtain from the landlord as compensation under this Act for such improvement such sum as fairly represents the value of the improvement to an incoming tenant: Provided always, that in estimating the value of any improvement in the schedule hereto there shall not be taken into account as part of the improvement made by the tenant what is justly due to the inherent capabilities of the soil.

As to Improvements executed before the Commencement of Act.

Restriction as
to improve-
ments before
Act.

2. Compensation under this Act shall not be payable in respect of improvements executed before the commencement of this Act, with these exceptions, namely,—

(1) Where a tenant has within ten years before the commencement of this Act executed an improvement specified in the third part of

the schedule hereto which he was not under an express obligation to make, and he is not entitled under any contract or custom to compensation in respect of such improvement; or,

- (2) Where a tenant has executed an improvement mentioned in the first or second part of this schedule within ten years previous to the commencement of this Act, and he is not entitled under any contract or custom to compensation in respect of such improvement, and the landlord, within one year after the commencement of this Act, declares in writing his consent to the making of the improvement.

In either of these cases the tenant, on quitting his holding at the determination of the tenancy after the commencement of this Act, may claim compensation under this Act in respect of the improvement which he has executed in the same manner as if this Act had been in force at the time of the execution of such improvement.

As to Improvements executed after the Commencement of Act.

3. Compensation under this Act shall not be payable in respect of any improvement specified in the first part of the schedule hereto, and executed after the commencement of this Act, unless the landlord, or his agent duly authorised on that behalf, has, previously to the execution of the improvement, and after the passing of this Act, consented in writing to the execution of such improvement, and any such consent may be given by the landlord unconditionally, or upon such terms as to compensation, or otherwise, as may be agreed upon between the landlord and the tenant, and in the event of any agreement being made between the landlord and the tenant, the compensation payable thereunder shall be deemed to be substituted for compensation under this Act.

Consent of landlord as to improvements in first part of schedule.

4. Compensation under this Act shall not be payable in respect of any improvement specified in the second part of the schedule hereto, and executed after the commencement of this Act, unless the tenant has, not more than three months and not less than two months before beginning to execute such improvement, given to the landlord, or his duly authorised agent, notice in writing of his intention so to do, and of the manner in which he proposes to do the intended work, and upon such notice being given, the landlord and tenant may agree on the terms as to compensation or otherwise on which the improvement is to be executed, and in the event of an agreement being made, that the improvement is to be executed by the tenant, the compensation payable thereunder shall be deemed to be substituted for compensation under this Act, or the landlord may undertake to execute the improvement himself, and unless the notice is previously withdrawn, proceed to do so in any reasonable and proper manner which he thinks fit, and charge the tenant with a sum not exceeding five pounds per centum per annum on the outlay incurred in executing the improvement, or not exceeding such annual sum payable for a period of twenty-five years, as will repay such outlay in the said period, with interest at the rate of three per centum per annum, such annual sums to be recoverable as rent. In default of any such agreement or undertaking, and also in the event of the landlord failing to comply with his undertaking within a reasonable time, the tenant may execute the improvement himself, and shall, in respect thereof, be entitled to compensation under this Act.

Notice to landlord as to improvements in second part of schedule.

Where in the case of a tenancy under a lease current at the passing

of this Act there is in such lease, or in any relative writing made prior to the passing hereof, an express stipulation limiting the outlay on any improvement specified in the second part of the schedule hereto, the tenant shall have no claim to compensation under this Act for any such improvement in excess of the sum provided for in such stipulation.

The landlord and tenant may, if they think fit, dispense with any notice under this section, and come to an agreement in terms of the lease or otherwise between themselves in the same manner and of the same validity as if such notice had been given.

Reservation as to existing and future leases.

5. Where, in the case of a tenancy under a lease current at the commencement of this Act, any agreement in writing or custom provides specific compensation for any improvement specified in the schedule hereto, compensation in respect of such improvement, although executed after the commencement of this Act, shall be payable in pursuance of such agreement or custom, and shall be deemed to be substituted for compensation under this Act.

Where, in the case of a tenancy under a lease beginning after the commencement of this Act, any particular agreement in writing secures to the tenant for any improvement specified in the third part of the schedule hereto, and executed after the commencement of this Act, fair and reasonable compensation, having regard to the circumstances existing at the time of making such agreement, then in such case the compensation in respect of such improvement shall be payable in pursuance of the particular agreement and not under this Act.

The last preceding provision of this section relating to a particular agreement shall apply in the case of a tenancy under a lease current at the commencement of this Act in respect of an improvement specified in the third part of the schedule hereto, specific compensation for which is not provided by any agreement in writing or custom.

Regulations as to Compensation for Improvements.

Compensation for improvements.

6. In the ascertainment of the amount of the compensation under this Act payable to the tenant in respect of any improvement there shall be taken into account in reduction thereof:

- (a) Any benefit which the landlord has given or allowed to the tenant in consideration of the tenant executing the improvement; and
- (b) In the case of compensation for manures the value of the manure that would have been produced by the consumption on the holding, according to the rules of good husbandry or according to the terms of any written contract specifying such rules, of any crops sold off or removed from the holding within the last two years of the tenancy or other less time for which the tenancy has endured, except in so far as a proper return of manure to the holding has been made in respect of such produce so sold off or removed.

The amount of compensation payable to the tenant shall be subject to deduction of any sums due to the landlord:

- (1) For rent payable in respect of the holding;
- (2) For any taxes, rates, or public burdens, or interest, moneys payable in respect of drainage, premiums of insurance payable in respect of the holding for which the tenant is liable as between him and the landlord;

(3) For the breach of any stipulation of the lease, or of any contract : relative to the lease, committed by the tenant ;

(4) For any deterioration committed or permitted by the tenant ;

There shall be added to the tenant's compensation any sum due to the tenant for compensation in respect of a breach of any stipulation of a lease, or other contract relative to a lease, committed by the landlord.

Nothing in this section shall enable a landlord to obtain under this Act compensation in respect of deterioration by the tenant or of breach of any stipulation by the tenant committed or permitted in relation to cultivation or management more than four years before the determination of the tenancy.

Procedure.

7. Notwithstanding anything in this Act, a tenant shall not be entitled to compensation under this Act unless four months at least before the determination of the tenancy he gives notice in writing to the landlord of his intention to make a claim for compensation under this Act. Notice of intended claim.

Where a tenant gives such a notice the landlord may, before the determination of the tenancy, or within fourteen days thereafter, give a counter-notice in writing to the tenant of his intention to make a claim for compensation under this Act.

Every such notice and counter-notice shall state, as far as reasonably may be, the particulars and amount of the intended claim.

8. The landlord and the tenant may agree on the amount and mode and time of payment of compensation to be paid to the tenant or to the landlord under this Act. Compensation agreed or settled by reference.

If in any case they do not so agree the difference shall be settled by a reference.

9. Where there is a reference under this Act, a single referee or two referees and an oversman, shall be appointed as follows :— Appointment of referee or referees and oversman.

(1) If the parties concur, a single referee may be appointed by them jointly :

(2) If before an award is pronounced the single referee dies or becomes incapable of acting, or for seven days after notice from the parties of his appointment he fails to accept the reference and to act, the proceedings shall begin afresh, as if no referee had been appointed :

(3) If the parties do not concur in the appointment of a single referee, each of them shall appoint a referee :

(4) If before an award is pronounced one of two referees dies or becomes incapable of acting, or for seven days after notice from the party appointing him of his appointment fails to accept the reference and to act, the party appointing him shall appoint another referee :

(5) Notice of every appointment of a referee by either party shall be given to the other party :

(6) If for seven days after notice by one party to the other to appoint a referee, or failing a referee appointed, another referee, the other party fails to do so, then, on the application of the party giving notice, the sheriff shall within fourteen days appoint a competent and impartial person to be a referee :

(7) Where two referees are appointed they shall before they enter on the reference appoint an oversman :

- (8) If before an award is pronounced an oversman dies or becomes incapable of acting, the referees shall appoint another oversman :
- (9) If for seven days after request from either party the referees fail to appoint an oversman, or failing an oversman appointed, another oversman, then, on the application of either party, the sheriff shall within fourteen days appoint a competent and impartial person to be the oversman :
- (10) Every appointment, notice, and request under this section shall be in writing.

The powers of the sheriff under this section shall be exercisable by him although he may not be at the time within the county.

Requisition for appointment of oversman by the sheriff.

10. Where two referees are appointed, an oversman may be appointed, as follows :

If either party on appointing a referee requires by notice in writing to the other that the oversman shall be appointed by the sheriff, then the oversman and any successor to him shall be appointed, on the application of either party, by the sheriff.

Mode of submission to referee.

11. The delivery to a referee of his appointment shall be deemed a submission to a reference by the party delivering it, and neither party shall have power to revoke a submission, or the appointment of a referee, without the consent of the other.

Power for referee, &c., to require production of documents, administer oaths, &c.

12. The referee or referees or oversman may call for the production of any sample or voucher or other document or evidence which is in the possession or power of either party, or which either party can produce, and which seems to the referee or referees or oversman necessary for the determination of the matters referred, and may take the examination of the parties and witnesses on oath, and may administer oaths and take affirmations; and if any person so sworn or affirming wilfully and corruptly gives false evidence he shall be guilty of perjury.

Power to proceed in absence.

13. The referee or referees or oversman may proceed in the absence of either party where this course appears to him or them expedient after notice given to the parties.

Form of award.

14. The award shall be in writing, signed by the referee or referees or oversman as the case may be.

Time for award of referee or referees.

15. A single referee shall pronounce his award and have the same ready for delivery within twenty-eight days after his appointment.

Two referees shall pronounce their award and have the same ready for delivery within twenty-eight days after the appointment of the last appointed of them, or within such extended time (if any) as they may from time to time jointly have fixed by writing under their hands, so that they have their award ready for delivery within a time not exceeding in the whole forty-nine days after the appointment of the last appointed of them.

Reference to and award by oversman.

16. Where two referees are appointed and act, if they fail to pronounce their award and have the same ready for delivery within the time aforesaid, then, on the expiration of that time, their powers as referees shall cease and determine, and thereupon the matters referred to them shall stand referred to the oversman.

The oversman shall pronounce his award and have the same ready for delivery within twenty-eight days after notice in writing given to him by either party or referee of the devolution of the reference to him, or within such extended time (if any) as the sheriff, on the application of the oversman, or of either party, may fix, so that the oversman pro-

nounce his award and have the same ready for delivery within a time not exceeding in the whole forty-nine days, after notice to him as aforesaid.

The powers of the sheriff under this section shall be exerciseable by him although he may not be at the time within the county.

In any case provided for by sections three, four, or five, if compensation is claimed under this Act, such compensation, as under any of those sections, is to be deemed to be substituted for compensation under this Act, if and so far as the same can consistently with the terms of the agreement, if any, be ascertained by the referees or the oversman, shall be awarded in respect of any improvements thereby provided for, and the award shall, when necessary, distinguish such improvements, and the amount awarded in respect thereof, and an award given under this section shall be subject to the appeal provided by this Act.

17. The award shall not find due or decern for a sum generally for compensation, but shall, as far as reasonably may be, specify— Award to give particulars.

- (a) The several improvements, acts, and things in respect whereof compensation is awarded, and the several matters and things taken into account in reduction or augmentation of such compensation ;
- (b) The time at which each of the improvements, acts, or things was executed, committed, permitted, or omitted ;
- (c) The sum awarded in respect of each improvement, act, matter, or thing ; and
- (d) Where the landlord desires to charge his estate with the amount of compensation found due to the tenant, the time at which, for the purposes of such charge, each improvement, act, or thing in respect of which compensation is awarded is to be deemed to be exhausted.

18. The expenses of and connected with the reference, including the remuneration of the referee or referees and oversman, and other proper expenses, shall be borne and paid by either party in whole or by the parties in such proportions as to the referee or referees or oversman appears just, regard being had to the reasonableness or unreasonableness of the claims of the parties or either of them, and to the whole circumstances of the case. Expenses of reference.

The award may decern for the payment of the whole or any part of the expenses by either party to the other, and in that case the award shall specify the amount to be so paid.

The amount of the expenses shall be subject to taxation by the auditor of the Sheriff Court, on the application of either party, but that taxation shall be subject to review by the sheriff.

19. The award shall fix a day, not sooner than one month after the delivery of the award, for the payment of the money awarded for compensation, expenses, or otherwise. Day for payment.

20. Where the sum claimed for compensation exceeds one hundred pounds, either party may, within seven days after delivery of the award, appeal against it to the sheriff on all or any of the following grounds : Appeal to sheriff.

- (1) That the award is invalid ;
- (2) That the award proceeds wholly or in part upon an improper application of, or upon the omission properly to apply, the special provisions of sections three, four, or five of this Act.
- (3) That compensation has been awarded for improvements, acts, or things, or for breaches of stipulations or agreements, or for

committing or permitting deterioration in respect of which the party claiming was not entitled to compensation ;

- (4) That compensation has not been awarded for improvements, acts, or things, or for breaches of stipulations or agreements, or for committing or permitting deterioration in respect of which the party claiming was entitled to compensation ;

and the sheriff shall hear and determine the appeal, and may, in his discretion, remit the case to be reheard as to the whole or any part thereof by the referee or referees or oversman, with such directions as he may think fit.

If no appeal is so brought the award shall be final.

The decision of the sheriff on appeal shall be final.

Recovery of
compensation.

21. Where any money agreed or awarded or ordered on appeal to be paid for compensation, expenses, or otherwise, is not paid within one month after the time when it is agreed or awarded or ordered to be paid, it shall be competent to record the agreement or award in the books of the Sheriff Court, to the effect of enabling execution to pass thereon in common form as upon an extract registered bond or decree arbitral ; and any order for payment made by a sheriff on appeal shall be enforced in the same manner as a decree for payment made under his ordinary jurisdiction is enforced.

Appointment
of guardian.

22. Where a landlord or a tenant is a pupil or minor, or is of unsound mind, not having a tutor, curator, or other guardian, the sheriff, on the application of any person interested, may appoint to him a tutor or curator for the purposes of this Act, and may recall the appointment of such tutor or curator and appoint another tutor or curator if and as occasion requires.

Expenses in
Sheriff Courts.

23. The Court of Session may by Act of Sederunt from time to time prescribe a scale of expenses for such proceedings in the Sheriff Court, and such expenses shall be taxed by the auditor of the Sheriff Court.

Charge of Tenant's Compensation.

Power for
landlord on
paying com-
pensation to
obtain charge.

24. A landlord on paying to the tenant the amount due to him in respect of compensation under this Act, or in respect of compensation authorised by this Act to be substituted for compensation under this Act, or on his defraying himself the cost of improvements proposed to be executed by the tenant, shall be entitled to obtain from the sheriff authority to charge the holding, or the estate of which it forms part, in respect thereof.

The sheriff shall have power, on proof of the payment, and on being satisfied of the observance in good faith by the parties of the conditions imposed by this Act, to grant authority to the landlord to charge the holding, or the estate of which it forms part, by executing and registering in the Register of Sasines a bond and disposition in security over it for repayment of the amount paid, or any part thereof, with such interest, and by such instalments, as the sheriff may determine ; or, if the landlord has only a leasehold interest in the holding, by executing and duly registering in the Register of Sasines an assignation of the lease in security and for repayment of the amount paid, or any part thereof, with such interest and by such instalments, as the sheriff may determine.

But, where the landlord obtaining the charge is not absolute owner

of the holding for his own benefit, no instalment or interest shall by such bond and disposition in security or assignation be made payable after the time when the improvement in respect whereof compensation is paid will, where an award has been made, be taken to have been exhausted according to the declaration of the award, and in any other case after the time when any such improvement will in the judgment of the sheriff, after hearing such evidence (if any) as he thinks expedient, have become exhausted; and such bond and disposition in security or assignation shall specify the times at which the total amount charged and each instalment thereof shall be payable.

The instalments and interest shall be charged in favour of the landlord, his executors, administrators, and assignees.

Any charge under this section shall rank after all prior charges and burdens heritably secured upon the holding or estate.

Where a holding or estate is charged by the landlord under this section, such charge shall not be deemed to be a contravention of any prohibition against charging or burdening contained in the deed or instrument under which the holding or estate is held by the landlord.

The price of any entailed land sold under the provisions of the Entail Acts, where such price is entailed estate within the meaning of those Acts, may be applied by the landlord in respect of the remaining portion of the entailed estate, or in respect of any other estate belonging to him, and entailed upon the same series of heirs, in payment of any expenditure and costs incurred by him in pursuance of this Act for executing or paying compensation for any improvement mentioned in the first or second parts of the schedule hereto, or in discharge of any charge with which the estate is burdened in pursuance of this Act in respect of such improvement.

25. Any company now or hereafter incorporated by Parliament, or incorporated under the Companies Acts, and having power to advance money for the improvement of land, or for the cultivation and farming of land, may make an advance of money upon a bond and disposition in security, or upon an assignation, as the case may be, executed by authority of the sheriff under the provisions of this Act, upon such terms and conditions as may be agreed upon between such company and the person entitled to such charge; and such company may assign any charge so acquired by them to any person or persons whomsoever.

26. The sum charged by the order of a sheriff under this Act shall be a charge on the holding or the estate of which it forms part for the landlord's interest therein, and for all interests therein subsequent to that of the landlord; provided that the charge shall not extend beyond the interest of the landlord, his executors, administrators, and assignees where the landlord has only a leasehold interest in the holding.

Removing for Non-Payment of Rent.

27. In any case in which the landlord's right of hypothec for the rent has ceased and determined—

When six months' rent of the holding is due and unpaid, it shall be lawful for the landlord to raise an action of removing before the sheriff against the tenant, concluding for his removal from the holding at the term of Whitsunday or Martinmas next ensuing after the action is brought, and unless the arrears of rent then due are paid, or caution

Advance made by a company.

Duration of charge.

Tenants to be removed only at legal terms. 43 Vict. c. 12.

is found to the satisfaction of the sheriff for the same, and for one year's rent further, the sheriff may decern the tenant to remove, and eject him at such term in the same manner as if the lease were determined, and the tenant had been legally warned to remove.

A tenant so removed shall have the rights of an outgoing tenant to which he would have been entitled if his lease had naturally expired at such term of Whitsunday or Martinmas.

The second and third sections of the Hypothec Abolition (Scotland) Act, 1880, are hereby repealed, and the provisions of the fifth section of the Act of Sederunt anent removing of the fourteenth day of December one thousand seven hundred and fifty-six shall not apply in any case in which the procedure under this section is competent.

Notice of Termination of Tenancy.

Notice of
termination of
tenancy.

28. Notwithstanding the expiration of the stipulated endurance of any lease, the tenancy shall not come to an end unless written notice has been given by either party to the other of his intention to bring the tenancy to an end—

(a) In the case of leases for three years and upwards, not less than one year, nor more than two years, before the termination of the lease :

(b) In the case of leases from year to year, or for any other period less than three years, not less than six months before the termination of the lease.

Failing such notice by either party the lease shall be held to be renewed by tacit relocation for another year, and thereafter from year to year.

16 & 17 Vict.
c. 80.

Notice by the landlord to the tenant under this section shall be given in the form and manner prescribed by the Sheriff Courts (Scotland) Act, 1853, and shall come in place of the notice required by the said Act.

Provided that nothing contained in this section shall affect the right of the landlord to remove a tenant who has been sequestrated under the Bankruptcy (Scotland) Act, 1856, or who by failure to pay rent or otherwise has incurred any irritancy of his lease, or other liability to be removed :

The provisions relative to notice herein contained shall not apply to any stipulation in a lease entitling the landlord to resume land for building, planting, feuing, or other purposes, or to subjects let for any period less than a year.

Bequest of
lease.

29. A tenant may by will, or other testamentary writing, bequeath his lease to any person (hereinafter called 'the legatee'), subject to the following provisions :—

(a) The legatee shall intimate the testamentary bequest to the landlord or his known agent within twenty-one days after the death of the tenant, unless he is prevented by some unavoidable cause from making intimation within that time, and in that event he shall make intimation as soon as possible thereafter.

(b) Intimation to the landlord or his known agent by the legatee shall import acceptance of the lease by the legatee.

(c) Within one month after intimation has been made to the landlord or his known agent, he may intimate to the legatee that he objects to receive him as tenant under the lease ;

If the landlord or his known agent makes no such intimation within one month, the lease shall be binding on the landlord and the legatee respectively as landlord and tenant as from the date of the death of the deceased tenant.

- (d) If the landlord or his known agent intimates that he objects to receive the legatee as tenant under the lease, the legatee may present a petition to the sheriff, praying for decree declaring that he is tenant under the lease as from the date of the death of the deceased tenant, of which petition due notice shall be given to the landlord, who may enter appearance, and state his grounds of objection; and if any reasonable ground of objection is established to the satisfaction of the sheriff, he shall declare the bequest to be null and void; but otherwise he shall decern and declare in terms of the prayer of the petition.
- (e) The decision of the sheriff under such petition as aforesaid shall be final.
- (f) Pending any proceedings under this section, the legatee shall have possession of the holding, unless the sheriff shall otherwise direct on cause shown.
- (g) If the legatee does not accept the bequest, or if the bequest is declared to be null and void as aforesaid, the lease shall descend to the heir of the tenant in the same manner as if the bequest had not been made.

Fixtures.

30. Where after the commencement of this Act a tenant affixes to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of and be removeable by the tenant before or within a reasonable time after the termination of the tenancy :

Tenant's
property in
fixtures,
machinery,
&c.

Provided as follows :—

1. Before the removal of any such fixture or building the tenant shall pay all rent owing by him, and shall perform or satisfy all his other obligations to the landlord in respect to the holding :
2. In the removal of any fixture or building the tenant shall not do any avoidable damage to any other building or other part of the holding :
3. Immediately after the removal of any fixture or building the tenant shall make good all damage occasioned to any building or other part of the holding by the removal :
4. The tenant shall not remove any fixture or building without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it :
5. At any time before the expiration of such notice the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building specified in the notice given by the tenant as aforesaid, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding; and any difference

as to the value shall be settled by a reference under this Act, as in case of compensation (but without appeal).

Crown Lands.

Application of
Act to Crown
lands.

31. This Act shall extend and apply to land belonging to Her Majesty the Queen, her heirs and successors, in right of the Crown.

With respect to such land, for the purposes of this Act, the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, or one of them, or other the proper officer or body having charge of such land for the time being, or in case there is no such officer or body, then such person as Her Majesty, her heirs or successors, may appoint in writing under the royal sign manual, shall represent Her Majesty, her heirs and successors, and shall be deemed to be the landlord.

Any compensation payable under this Act by the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, or either of them, in respect of an improvement of the first class, shall be deemed to be payable in respect of an improvement of land within section one of the Crown Lands Act, 1866, and the amount thereof shall be charged and repaid as in that section provided with respect to the costs, charges, and expenses therein mentioned.

Any compensation payable under this Act by those Commissioners, or either of them, in respect of an improvement of the second class, or of the third class, shall be deemed to be part of the expenses of the management of the Land Revenues of the Crown, and shall be payable by those Commissioners out of such money and in such manner as the last-mentioned expenses are by law payable.

Ecclesiastical and Charity Lands.

Consents in
case of glebes,
&c.

32. The powers by this Act conferred on a landlord shall not be exercised by ministers in respect of their glebes, except with the previous approval in writing of the Presbytery of the bounds, and shall not be exercised by trustees for ecclesiastical, educational, or charitable purposes, except with the previous approval in writing of one of Her Majesty's principal Secretaries of State.

Provision as
to limited
owners.

33. Subject to the provisions of this Act in relation to Crown, ecclesiastical, and charity lands, a landlord, whatever may be his estate or interest in his holding, may give any consent, make any agreement, or do or have done to him any act in relation to improvements in respect of which compensation is payable under this Act which he might give or make or do or have done to him if he were absolute owner of the holding.

General Provisions.

Commence-
ment of Act.

34. This Act shall come into force on the first day of January one thousand eight hundred and eighty-four, which day is in this Act referred to as the commencement of this Act.

Application
of Act.

35. Nothing in this Act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural, and as to the residue pastoral, or in whole or in part cultivated as a market-garden, or to any holding let to the tenant during his continuance in any office, appointment, or employment of the landlord.

Avoidance of
agreement
inconsistent
with Act.

36. Any contract or agreement made by a tenant by virtue of which he is deprived of his right to claim compensation under this Act in

respect of any improvement specified in the schedule hereto (except an agreement providing such compensation as is by this Act permitted to be substituted for compensation under this Act) shall, so far as it deprives him of such right, be void.

37. Where an incoming tenant has, with the consent in writing of his landlord paid to an outgoing tenant any compensation payable under or in pursuance of this Act in respect of the whole or part of any improvement, such incoming tenant shall be entitled on quitting the holding to claim compensation in respect of such improvement or part in like manner, if at all, as the outgoing tenant would have been entitled if he had remained in the tenancy, and quitted the holding at the time at which the incoming tenant quits the same.

Right of tenant in respect of improvement purchased from outgoing tenant.

38. A tenant shall not be entitled to claim compensation by custom or otherwise than in manner authorised by this Act in respect of any improvement for which he is entitled to compensation under this Act, but where he is not entitled to compensation under this Act he may recover compensation under any agreement or custom in the same manner as if this Act had not passed.

Compensation under this Act to be exclusive.

39. A tenant who has remained in his holding during a change or changes of tenancy shall not thereafter on quitting his holding at the determination of a tenancy be deprived of his right to claim compensation in respect of improvements by reason only that such improvements were made during a former tenancy or tenancies, and not during the tenancy at the determination of which he is quitting.

Provision as to change of tenancy.

40. Except as in this Act expressed, nothing in this Act shall take away, abridge, or prejudicially affect any power, right, or remedy of a landlord, tenant, or other person vested in or exercisable by him by virtue of any other Act or law, or under any custom of the country, or otherwise, in respect of a lease or other contract or of any improvements, deteriorations, away-going crops, fixtures, tax, rate, teind, rent, or other thing.

General saving of rights.

41. It shall be no objection to the validity of any consent in writing or agreement in writing within the provisions of this Act signed by the party or parties thereto or by any person or persons authorised by him or them that such consent or agreement has not been executed in accordance with the statutes regulating the execution of deeds in Scotland.

Consents, &c., not subject to statutes regulating execution of deeds.

42. In this Act—

Interpretation.

‘Lease’ means a letting of or agreement for the letting land for a term of years, or for lives, or for lives and years, or from year to year :

A tenancy from year to year under a lease current at the commencement of the Act shall for the purposes of this Act be deemed to continue to be a tenancy under a lease current at the commencement of this Act until the first day after the commencement of this Act, on which either the landlord or tenant of such tenancy could, the one by giving notice to the other, cause such tenancy to determine, and on and after such day as aforesaid shall be deemed to be a tenancy under a contract of tenancy beginning after the commencement of this Act :

‘Determination of tenancy’ means the termination of a lease by reason of effluxion of time, or from any other cause :

‘Landlord’ in relation to a holding means any person for the time

being entitled to receive the rents and profits of or to take possession of any holding :

‘Tenant’ means the holder of land under a lease :

‘Landlord’ or ‘tenant’ includes the executors, administrators, assignees, legatee, disponent, or next-of-kin, husband, guardian, *curator bonis*, or trustees in bankruptcy, of a landlord or tenant :

‘Holding’ means any piece of land held by a tenant :

‘Absolute owner’ means the owner or person capable of disposing, by disposition or otherwise, of the fee-simple or, *dominium utile*, of the whole interest of or in land, although the land or his interest therein is burdened, charged, or encumbered :

‘Person’ includes a body of persons and a corporation :

‘Sheriff Courts (Scotland) Act, 1853,’ means an Act passed in the sixteenth and seventeenth year of Her present Majesty’s reign, chapter eighty, intituled ‘An Act to facilitate procedure in the ‘Sheriff Courts in Scotland’ :

‘Companies Acts’ means the Companies Acts, 1862 to 1880, and any Act amending the same :

‘Sheriff’ includes sheriff-substitute.

The designations of landlord and tenant shall continue to apply to the parties until the conclusion of any proceedings taken under this Act in respect of compensation for improvements.

Short title of Act.

43. This Act may be cited for all purposes as ‘The Agricultural ‘Holdings (Scotland) Act, 1883,’ and shall apply to Scotland only.

SCHEDULE.

PART I.

Improvements to which Consent of Landlord is required.

- (1) Erection or enlargement of building.
- (2) Formation of silos.
- (3) Laying down of permanent pasture.
- (4) Making of water meadows or works of irrigation.
- (5) Making of gardens.
- (6) Making or improving of roads or bridges.
- (7) Making or improving of water-courses, ponds, wells, or reservoirs, or of works for supply of water for agricultural or domestic purposes.
- (8) Making of permanent fences.
- (9) Reclamation of waste land.
- (10) Weiring or embanking of land and sluices against floods.

PART II.

Improvement in respect of which Notice to Landlord is required.

- (11) Drainage.

PART III.

Improvements to which Consent of Landlord is not required.

- (12) Boning of land with undissolved bones.
- (13) Claying of land or spreading blaes upon land.
- (14) Liming of land.
- (15) Marling of land.

- (16) Application to land of purchased artificial or other purchased manure.
 (17) Consumption on the holding by cattle, sheep, or pigs of cake or other feeding stuff not produced on the holding.

No. III.

30 & 31 VICTORIA, c. 42.

An Act to amend the Law relating to the Landlord's Right of Hypothec in Scotland, in so far as respects Land held for Agricultural or Grazing Purposes.—[15th July, 1867.]

WHEREAS it is expedient to amend the Law relating to the landlord's right of hypothec in Scotland, in so far as respects land held for grazing or agricultural purposes :

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. This Act shall apply only to Scotland, and may be cited for all purposes by the title of the 'Hypothec Amendment (Scotland) Act, 1867.'

Act to apply only to Scotland, and short title.

2. This Act shall be construed as applying only to farms or land with the buildings thereon occupied for farming purposes, and shall not apply to dwelling-houses, shops, and other subjects, though the same may be in rural districts, where the primary or chief purpose of the occupation shall be other than the raising of agricultural produce or the raising and rearing of live stock, saving and excepting always the provision hereinafter contained for the keeping of a Register of Sequestrations which shall be held as applicable to all sequestrations for rent whether of rural or urban subjects.

Act to apply only to land held for farming purposes ;

save as respects Register of Sequestrations.

3. Whensoever any agricultural produce shall have been *bonâ fide* purchased by any person for its fair marketable value from the tenant or lessee of any farm or lands, and shall have been actually delivered to the purchaser, and removed from such farm or lands, and the price thereof shall have been paid, or whensoever agricultural produce shall have been *bonâ fide* purchased at public auction from the tenant or lessee, or any party holding his authority so to sell, after seven days written notice of the intention of the tenant or lessee, or party holding his authority to sell by public auction, shall have been given to the landlord or lessor, or person or persons entitled to the rent of such farm or land, or his or their factor or known agent, and sequestration shall not have been obtained and registered in manner hereinafter provided previous to or during the currency of such notice, then in either of these cases all right of hypothec competent to the landlord, lessor, or person or persons entitled to the rent of such farm or lands over such agricultural produce shall cease and determine : Provided always, that nothing herein contained shall apply to any agricultural produce which the tenant is not entitled legally or by the terms of his lease to sell or carry off the land, or which previous to the completion of the purchase thereof by the removal of the same from the farm or lands, and by

Corn, &c., purchased *bonâ fide*, and delivered and removed, to be free from hypothec.

payment of the price, or after such notice as that above referred to, has been sequestrated at the instance of such landlord, lessor, or other person, and the sequestration whereof has been registered in the register of sequestrations for rent, to be kept as hereinafter provided, and is in force at the time of such purchase.

Hypothec not to be available beyond three months after rent is payable.

4. In the event of the landlord, lessor, or person entitled to the rent of any farm or lands failing to commence proceedings for making effectual by sequestration his right of hypothec within three calendar months after the conventional term at which the year's rent or the last portion due thereof is made payable under the terms of the lease, writing, or bargain under which such farm or lands are possessed, or if no conventional term for payment of the rent or any portion thereof has been agreed upon then within three calendar months after the legal term at which such year's rent or the last portion due thereof is payable, then all right of hypothec for the rent or portion thereof payable at such term, conventional or legal, shall cease and determine: Provided always, that the provisions of this section shall not apply to the landlord's right of hypothec, or to his right to use sequestration for rent payable under any lease, writing, or bargain current at the date of the passing of this Act.

Stock of third party taken on a farm to graze to be liable only to the amount of consideration payable for the grazing.

5. In the event of the tenant or lessee of any farm or lands having received and taken thereon to be grazed or fed any sheep, cattle, or other live stock belonging to any other person, and having agreed with the owner of the same for a *bond fide* payment equal to the just value of such grazing or feeding, such sheep, cattle, or stock shall be liable to the hypothec of the landlord, lessor, or person entitled to the rent of the farm or lands, to the extent of the amount of such payment, and no further: Provided always, that so long as any portion of such sheep, cattle, or other live stock shall remain on the farm or lands, the hypothec over such portion shall continue to the full extent of the payment originally agreed upon for the grazing or feeding of the whole of such sheep, cattle, or other live stock; and that in the event of the removal of the sheep, cattle, or other live stock, or any portion thereof, from the farm or lands, the right of hypothec shall, so long as the payment or any part thereof shall remain unpaid, continue to apply to such sheep, cattle, or other live stock to the extent of the amount of the payment, or such part thereof as shall be unpaid.

When agricultural produce or stock is sequestrated, incompetent to sequestrate furniture, implements, imported manures, &c.

6. In the sequestration for the rent of any farm or lands, as defined by this Act, it shall not be competent to include any household furniture or furnishings or any agricultural implements, nor shall it be competent, except as hereinafter provided, to sequestrate for the rent any imported manure, lime, drain tiles, feeding stuffs, or other material, not being the produce of or made upon the farm or lands, and not at the time incorporated with the soil or consumed or otherwise applied to the purposes for which such material may have been procured: Provided always, that where manure of any kind, or lime, or drain tiles, feeding stuffs, or other material have been brought upon the farm or lands for the purpose of being used thereon in fulfilment of any specific obligation imposed by the lease, such manure, lime, drain tiles, feeding stuffs, or other material may competently be included among the sequestrated effects: Provided also, that nothing herein contained shall be held as affecting either the right of using sequestration or the description of articles which may be sequestrated, in so far as respects premises

and occupations of buildings or of lands to which this Act does not apply.

7. At each sheriff's or other Court where sequestration for rent is or may be granted a register, entitled the 'Register of Sequestrations for Rent' for the particular Court, shall be kept by the sheriff-clerk, sheriff-clerk-depute, or other officer of Court having custody of the records thereof, in the form set forth in the schedule appended hereto, or as nearly in that form as may be, and on the granting of any sequestration for rent there shall be forthwith entered in such register the name or names of the tenant or lessee whose agricultural produce, live stock, or effects are sequestrated, and the several particulars detailed in the schedule appended hereto; and every person shall be entitled, on payment of a fee of one shilling, to search the said register during office hours of every day on which the office of the sheriff-clerk, sheriff-clerk-depute, or other officer of Court having the custody thereof shall be open; and all such fees shall be duly accounted for and shall be paid by the sheriff-clerk, sheriff-clerk-depute, or other officer receiving the same to the credit of Her Majesty's Exchequer at such times and in such manner as the Commissioners of Her Majesty's Treasury shall from time to time direct.

SCHEDULE referred to in the foregoing Act.

Register of Sequestrations for Rent for the County of _____

Name and residence of tenant or lessee whose produce, stock, or effects are sequestered.	Date of sequestration.	Name or description of rural or urban subjects.	Rent for which sequestration granted.	Date when payable.	Landlord or person taking out sequestration.

No. IV.

43 VICTORIA, c. 12.

An Act to abolish the Landlord's Right of Hypothec for Rent in Scotland.
—[24th March 1880.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Landlord's
hypothec to
cease after
11th Nov-
ember, 1881.

1. From and after the eleventh day of November one thousand eight hundred and eighty-one, hereinafter called the commencement of this Act, the landlord's right of hypothec for the rent of land, including the rent of any buildings thereon, exceeding two acres in extent, let for agriculture or pasture, shall cease and determine: Provided that nothing herein contained shall apply to any claim for rent due, or which may hereafter become due, under any lease, writing, or bargain current at the date of the commencement of this Act.

Landlord's
remedies when
rent is due
and unpaid.
[Repealed,
supra, p. 592.]

2. From and after the commencement of this Act the landlord of any land exceeding two acres in extent, and let for agriculture or pasture, shall, subject to the provisions of the preceding section of this Act, have the same rights and remedies against his tenant when six months' rent is due and unpaid as is now provided by the law of Scotland when twelve months' rent is due and unpaid, and shall also have the same rights and remedies against his tenant when twelve months' rent is due and unpaid as is now provided by the law of Scotland when two years' rent is due and unpaid, but subject always to the following provision; (that is to say), it shall not be lawful for the sheriff or sheriff-substitute to entertain any action for caution and removing or for irritancy and removing, unless such action has been preceded by fourteen days' written notice by registered post-office letter or otherwise to the tenant that such action is intended, nor in an action for caution and removing to decern the tenant to find caution for more than the arrears of rent and one year's rent further.

Provided also, that in the event of the removal or ejection of a tenant from such land in any year under the provisions of the Act of Sederunt anent removings of the fourteenth day of December one thousand seven hundred and fifty-six, and of this Act, on account of being in arrear of rent for six months or twelve months, as the case may be, the following further provisions shall have effect:

(1) A tenant so removed or ejected shall not thereby forfeit the rights of an outgoing tenant to which he would have been entitled if his lease had naturally expired at the date of removing or ejection, or at the last preceding term of Whitsunday or Martinmas in the event of the removing or ejection taking place between these terms:

(2) When the removing or ejection takes place between the before-mentioned terms, the tenant shall be entitled to payment of or credit for the expenditure made by such tenant since the last preceding term on the labour, seed, and manure applied to any crop, other than an away-going crop, falling within the immediately preceding provision:

(3) Where a tenant is removed or is ejected between the before-mentioned terms, he shall not, except as hereinafter provided, be liable to pay for the occupation of such land after the immediately

preceding term of Whitsunday or Martinmas more than a proportion of the rent effeiring to the period between such term and the date of removing or ejection: Provided always, unless otherwise expressly stipulated, that where any away-going crop to which the tenant is entitled is immature at the date of such removing or ejection, neither the tenant nor any one deriving right through him shall be entitled to carry away such crop at maturity until payment shall have been made to the landlord of the proportion of rent effeiring to the land under such crop for the period between the date of removing or ejection, and the next term of Martinmas, the rent of such land being estimated according to the average rent of the whole land from which the tenant has been so removed or ejected.

3. The provisions of the second section of this Act shall not apply in any case in which the landlord's right of hypothec has not ceased and determined.

Provisions of section 2 not to apply in addition to hypothec. [Repealed, *supra*, p. 592.

4. This Act may be cited as 'The Hypothec Abolition (Scotland) Act, 1880.'

NO. V.

40 & 41 VICTORIA, c. 28.

An Act to amend the Laws relating to Game in Scotland.—[2nd August, 1877.]

WHEREAS divers Acts of Parliament have from time to time been passed relating to the preservation of game in Scotland, and certain of these Acts are enumerated in Schedule I. to this Act annexed, and are in this Act referred to as the 'Game Acts':

And whereas it is expedient that these Acts should be amended:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as 'The Game Laws Amendment (Scotland) Act, 1877,' and shall apply to Scotland only.

Short title and extent of Act.

2. This Act shall commence and come into operation on the first day of January, one thousand eight hundred and seventy-eight, which day is hereafter referred to as the commencement of this Act.

Commencement of Act.

3. In this Act, unless there be something in the subject or context repugnant to such construction:

Interpretation.

- (1) The word 'lessor' shall mean the grantor of any lease of land for any term not less than two years, and also the person or persons for the time in the right and subject to the obligations of the grantor with respect to such lease;
- (2) The word 'lessee' shall mean the grantee of any lease of land for any term not less than two years, and also the person or persons for the time in the right and subject to the obligations of the grantee with respect to such lease;
- (3) The word 'sheriff' shall include sheriff-substitute;
- (4) The word 'game' shall include all the animals enumerated in the Game Acts or any of them;

- (5) The word 'crop' shall include grass, whether intended for hay or pasture, except where grown upon muirlands ;
- (6) The term 'Small-Debt Acts' shall mean the Act of the seventh year of William the Fourth and the first year of Victoria, chapter forty-one, and any Acts amending the same ;
- (7) The term 'Sheriffs Small-Debt Court' shall mean the Court established under the Small-Debt Acts.

Lessee
entitled to
compensation
for excessive
damage to
crops by game.

4. Where under any lease made subsequently to the commencement of this Act, or where by presumption of common law upon any land occupied under a lease made subsequently to the commencement of this Act, the lessor shall reserve or retain the sole right of hunting, killing, or taking rabbits, hares, or other game, or any of them, the lessee shall be entitled to compensation for the damage done to his crops in each year by the rabbits and hares or other game to which the lessor may have reserved or retained the sole right, in excess of such sum as may have been set forth in the lease as the amount of annual damage for which it is agreed no compensation shall be due ; and if no such sum shall be set forth in the lease, then in excess of the sum of forty shillings.

During the currency of any lease the parties thereto may from time to time, by any agreement in writing, increase or diminish the estimated amount of the annual damage aforesaid.

In case of
excessive
damage, lessee
to intimate
the same to
lessor.

5. In the event of a lessee in occupation of land under a lease made subsequently to the commencement of this Act being of opinion that the damage done to his crops by rabbits or hares or other game to which the lessor may have reserved or retained the sole right, in any one year during the lease, such year being reckoned from Whitsunday to Whitsunday, has exceeded the sum named in the lease, or if no sum is therein named, the sum of forty shillings, he shall intimate this opinion to the lessor in writing, stating at the same time that it is his intention, failing agreement as to the amount of such excess of damage, or a reference to arbiters to settle the same, to take steps to recover the amount of such excess of damage in the form and manner herein-after provided.

Provisions as
to arbi-
trations for
settling
claims of
damage
between
lessor and
lessee.

6. When a lessor and lessee agree in writing to refer to arbitration any claim of damage arising under this Act, or have agreed so to do in any lease made subsequently to the passing of this Act, the following provisions shall have effect :—

1. Either party having in writing named an arbiter, and given notice of the nomination to the other party, and called on him to name an arbiter, and the other party having for fourteen days after such call failed to comply therewith in writing, the arbiter nominated may settle the claim as if he had been appointed by both parties, and his award shall be final. The office of every such arbiter shall be held to endure until the term of Whitsunday next following the date of his appointment, and thereafter until he shall have given his award or awards with reference to all claims for any damages as aforesaid arising during the year ended at the same term.
2. Where two arbiters are named by the parties the arbiters shall, before proceeding to the arbitration, name in writing an oversman or umpire who shall be entitled finally to decide on the claim in case of their disagreement.
3. The reference, the claim, the nomination of an arbiter or overs-

man, and the award may be validly made by any writing, however informal, admitted or proved to be genuine.

4. No proceedings under this section shall be void for want of form. In an arbitration under this section the course of the procedure and the inquiry shall be such as the person or persons acting therein shall direct, and the award therein shall be final, and though informal may be enforced by action in any Court of law, according to the true construction and tenor thereof.

5. Any notice under this section shall be in writing, and may be served on the person to whom it is to be given either personally or by leaving it for him at his last known place of abode in Scotland, or by sending it through the post in a registered letter addressed to him there; and if so sent by post it shall be deemed to have been served at the time when the letter containing it would be delivered in ordinary course, and in order to prove service by letter it shall be sufficient to prove that the letter was properly addressed and posted and that it contained the notice to be served.

7. With regard to actions for the recovery of damages under this Act, the following provisions shall have effect:

Provisions
as to actions
of damage
between
lessor and
lessee.

1. No such action at the instance of a lessee against a lessor shall be competent unless the lessee shall have given to the lessor notice in writing of his intention to bring the same, in the case of damage done to growing crop, except grass for pasture, at least three weeks before the crop is reaped or raised, and in the case of damage done to crop reaped or raised, at least one week before it is removed from the land, and in the case of damage done to grass for pasture at least fourteen days before any person to be called as a witness by the lessee to value the damage shall inspect the crop with the view of valuing such damage:

2. Any such action may be brought in the Sheriffs Small-Debt Court of the county within which the lands or any part thereof are situated, without regard to the amount sued for in name of damage, provided that such amount shall not exceed the sum of fifty pounds sterling, exclusive of expenses and fees of extracts, and all the provisions of the Small-Debt Acts shall apply to any such action so brought in the same manner as if such action were brought for a sum not exceeding twelve pounds sterling: Provided always, that the sheriff-substitute shall, whenever required to do so by either party, take and record the evidence led before him, in which case an appeal shall lie to the sheriff, whose judgment shall be final.

3. Where the amount sued for exceeds the sum of fifty pounds the action shall be brought in the ordinary Sheriff Court.

8. From and after the commencement of this Act, it shall be lawful for any lessee, being in the actual occupation of lands and having the right of killing hares thereon, by himself or by any person directed or authorised by him in writing according to the form in Schedule II. to this Act annexed, or to the like effect, to pursue, take, kill, or destroy any hare then being in or upon any such land without obtaining any game certificate.

Lessee in
actual
occupation
may kill hares
without game
certificate.

9. Provided always, and be it enacted, that no lessee shall be authorised to grant or continue, under the provisions of this Act, authority to more than one person at one and the same time to kill

Limit of
authority
to kill
hares.

hares upon the land occupied by him within any one parish: Provided also, that the lessee shall intimate to the lessor of the said lands, or his factor, or any one to whom he may have instructed the lessee to transmit such intimation, the name of the person so authorised by the lessee.

Prosecutions
under Game
Acts.

10. From and after the commencement of this Act, all offences against the Game Acts shall be prosecuted subject to the following provisions; that is to say,

- (1) Any prosecution which is at present competent either before the sheriff or the justices of the peace for the county shall, from and after the passing of this Act, be competent only before the sheriff:
- (2) Any prosecution which is at present competent only before the justices of the peace for the county shall, from and after the passing of this Act, be competent only before the sheriff, who shall have all jurisdiction, authority, and power necessary for entertaining and determining the same; and all forms, procedure, and provisions applicable to prosecutions before justices of the peace shall, except as hereinafter provided, be applicable, *mutatis mutandis*, to prosecutions before the sheriff as aforesaid:
- (3) Where in any county there is more than one resident sheriff-substitute any prosecution under the Game Acts shall be brought before the Court of a sheriff-substitute within whose district the offence is alleged to have been committed, or before the sheriff sitting in such Court:
- (4) Offences which are now cognisable only by the Court of Justiciary shall hereafter be prosecuted only before such Court.

No person to
be prosecuted
again for the
same offence.

11. From and after the commencement of this Act, any person who has been or shall be prosecuted for any act or acts as constituting an offence under any one or more of the Game Acts shall not be liable to be again prosecuted for the same act or acts as constituting an offence under any other of the Game Acts: Provided always, that nothing in this section shall apply to any prosecution under any enactment relating to the Inland Revenue.

Existing leases
or agreements
about game
not to be
affected.

12. This Act shall not prejudice or affect any lease of land or any lease or agreement about game existing at the date of the commencement of this Act.

SCHEDULES.

I.

An Act of the Parliament of Scotland, passed in the year 1587, chapter 43, intituled 'Aganis slayeris of deir and utheris wyld beastis.'

An Act of the Parliament of Scotland, passed in the year 1621, chapter 31, intituled 'Anent hunting and hauling.'

An Act of the Parliament of Scotland, passed in the year 1707, chapter 91, intituled 'Act for preserving the game.'

An Act for the more effectual preservation of the game in that part of Great Britain called Scotland, and for repealing and amending several of the laws now in being relative thereto. 13 George III. chapter 54.

An Act for repealing two Acts passed in the thirty-sixth year of the reign of His present Majesty, which limit the time for killing partridges in England and Scotland, and for amending so much of an Act passed in the second year of the reign of His present Majesty, as relates to such limitation within that part of Great Britain called England, by making other provisions for that purpose. 39 Geo. III. chapter 34.

An Act for the more effectual prevention of persons going armed by night for the destruction of game. 9 George IV. chapter 69.

An Act to amend the laws in England relative to game. 1 & 2 William IV. chapter 32.

An Act for the more effectual prevention of trespasses upon property by persons in pursuit of game in that part of Great Britain called Scotland. 2 & 3 William IV. chapter 68.

An Act to extend an Act of the ninth year of King George the Fourth for the more effectual prevention of persons going armed by night for the destruction of game. 7 & 8 Victoria, chapter 29.

An Act to enable all persons having at present a right to kill hares in Scotland to do so themselves or by persons authorised by them, without being required to take out a game certificate. 11 & 12 Victoria, chapter 30.

An Act to repeal the duties on game certificates, and certificates to deal in game, and to impose in lieu thereof duties on excise licences and certificates for the like purposes. 23 & 24 Victoria, chapter 90.

An Act to amend the laws relating to the Inland Revenue. 24 & 25 Victoria, chapter 91.

An Act for the prevention of poaching. 25 & 26 Victoria, chapter 114.

II.

I, *A.B.*, do authorise *C.D.* to kill hares on the lands occupied by me within the (*here insert the name of the parish or other place, as the case may be*).

Dated this day of
(*here insert the day, month, and year*).

A.B.

Witness.

No. VI.

43 & 44 VICTORIA, c. 47.

An Act for the Better Protection of Occupiers of Land against Injury to their Crops from Ground Game.—[7th September 1880.]

WHEREAS it is expedient in the interests of good husbandry, and for the better security for the capital and labour invested by the occupiers of land in the cultivation of the soil, that further provision should be made to enable such occupiers to protect their crops from injury and loss by ground game :

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. Every occupier of land shall have, as incident to and inseparable from his occupation of the land, the right to kill and take ground game thereon, concurrently with any other person who may be entitled to kill and take ground game on the same land : Provided that the right

Occupier to have a right inseparable from his occupation to kill

ground game concurrently with any other person entitled to kill the same on land in his occupation.

conferred on the occupier by this section shall be subject to the following limitations:

- (1) The occupier shall kill and take ground game only by himself or by persons duly authorised by him in writing:
 - (a) The occupier himself and one other person authorised in writing by such occupier shall be the only persons entitled under this Act to kill ground game with firearms;
 - (b) No person shall be authorised by the occupier to kill and take ground game, except members of his household resident on the land in his occupation, persons in his ordinary service on such land, and any one other person *bonâ fide* employed by him for reward in the taking and destruction of ground game;
 - (c) Every person so authorised by the occupier, on demand by any person having a concurrent right to take and kill the ground game on the land or any person authorised by him in writing to make such demand, shall produce to the person so demanding the document by which he is authorised, and in default he shall not be deemed to be an authorised person.
- (2) A person shall not be deemed to be an occupier of land for the purposes of this Act by reason of his having a right of common over such lands; or by reason of an occupation for the purpose of grazing or pasturage of sheep, cattle, or horses for not more than nine months.
- (3) In the case of moorlands, and uninclosed lands (not being arable lands), the occupier and the persons authorised by him shall exercise the rights conferred by this section only from the eleventh day of December in one year until the thirty-first day of March in the next year, both inclusive; but this provision shall not apply to detached portions of moorlands or uninclosed lands adjoining arable lands, where such detached portions of moorlands or uninclosed lands are less than twenty-five acres in extent.

Occupier entitled to kill ground game on land in his occupation not to divest himself wholly of such right.

2. Where the occupier of land is entitled otherwise than in pursuance of this Act to kill and take ground game thereon, if he shall give to any other person a title to kill and take such ground game, he shall nevertheless retain and have as incident to and inseparable from such occupation, the same right to kill and take ground game as is declared by section one of this Act. Save as aforesaid, but subject as in section six hereafter mentioned, the occupier may exercise any other or more extensive right which he may possess in respect of ground game or other game, in the same manner and to the same extent as if this Act had not passed.

All agreements in contravention of right of occupier to destroy ground game void.

3. Every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier as declared, given, and reserved to him by this Act, or which gives to such occupier any advantage in consideration of his forbearing to exercise such right, or imposes upon him any disadvantage in consequence of his exercising such right, shall be void.

Exemption from game licences, 33 & 34 Vict. c. 57.

4. The occupier and the persons duly authorised by him as aforesaid shall not be required to obtain a licence to kill game for the purpose of killing and taking ground game on land in the occupation of such occupier, and the occupier shall have the same power of selling any

ground game so killed by him, or the persons authorised by him, as if he had a licence to kill game: Provided that nothing in this Act contained shall exempt any person from the provisions of the Gun Licence Act, 1870.

5. Where at the date of the passing of this Act the right to kill and take ground game on any land is vested by lease, contract of tenancy, or other contract *bonâ fide* made for valuable consideration in some person other than the occupier, the occupier shall not be entitled under this Act, until the determination of that contract, to kill and take ground game on such land. And in Scotland, when the right to kill and take ground game is vested by operation of law or otherwise in some person other than the occupier, the occupier shall not be entitled by virtue of this Act to kill or take ground game during the currency of any lease or contract of tenancy under which he holds at the passing of this Act, or during the currency of any contract made *bonâ fide* for valuable consideration before the passing of this Act whereby any other person is entitled to take and kill ground game on the land. Saving clause.

For the purposes of this Act, a tenancy from year to year, or a tenancy at will, shall be deemed to determine at the time when such tenancy would by law become determinable if notice or warning to determine the same were given at the date of the passing of this Act.

Nothing in this Act shall affect any special right of killing or taking ground game to which any person other than the landlord, lessor, or occupier may have become entitled before the passing of this Act by virtue of any franchise, charter, or Act of Parliament.

6. No person having a right of killing ground game under this Act or otherwise shall use any firearms for the purpose of killing ground game between the expiration of the first hour after sunset and the commencement of the last hour before sunrise; and no such person shall, for the purpose of killing ground game, employ spring-traps except in rabbit holes, nor employ poison; and any person acting in contravention of this section shall, on summary conviction, be liable to a penalty not exceeding two pounds. Prohibition of night shooting, spring-traps above ground, or poison.

7. Where a person who is not in occupation of land has the sole right of killing game thereon (with the exception of such right of killing and taking ground game as is by this Act conferred on the occupier as incident to and inseparable from his occupation), such person shall, for the purpose of any Act authorising the institution of legal proceedings by the owner of an exclusive right to game, have the same authority to institute such proceedings as if he were such exclusive owner, without prejudice nevertheless to the right of the occupier conferred by this Act. As to non-occupier having right of killing game.

8. For the purposes of this Act—

The words 'ground game' mean hares and rabbits. Interpretation clause.

9. A person acting in accordance with this Act shall not thereby be subject to any proceedings or penalties in pursuance of any law or statute. Exemption from penalties.

10. Nothing in this Act shall authorise the killing or taking of ground game on any days or seasons, or by any methods, prohibited by any Act of Parliament in force at the time of the passing of this Act. Saving of existing prohibitions.

11. This Act may be cited for all purposes as 'The Ground Game Act, 1880.' Short title.

No. VII.

1555, c. 39.

Anent the Warning of Tennentes.

(In Thomson's Acts, c. 12, II. 494.)

IT is statute and ordanit that in all tymes cumming the warning of all tennentis and uthers to flit and remove fra landis mylnis fischingis and possessionnis quhatsumever sall be usit in maner following: That is to say, lauchfull warning being made ony time within the zeir xl. dayis befor the feist of Witsonday outhir personallie or at thair dwelling placis and at the ground of the landis and ane copie deliverit to the wyfe or servandis and failzeing thaireof to be affixit upon the yettis or duris of the dwelling placis of the saidis landis gif ony be and thairefter the samin precept of warning to be red in the paroch kirk quhair the landis lyis upone ane Sonday befor nune the tyme of the hie messe and ane copie left and affixit upone the maist patent dure of the kirk xl. dayis befor the terme and na forther laying furth of stressis and removing upone Wednesday to be usit in tyme to cum: And gif the partie warnit in maner foirsaid removis not at the terme in that caice the warnar sall incontinent or sa sone as plesis him cum to the Lordis of Counsall or to the schiref of the schire or uthers jugeis ordinaris havand jurisdictioun schawand his precept of warning orderlie execute and indorsat and sal have letters or precept to charge the parteis warnit and possessouris of that ground to compeir befor the saidis Lordis Schireffis or thair deputis or uthers jugeis ordinaris foirsaidis havand jurisdictioun upone sax dayis warning or langar at the will and desyre of the persewar to heir and see thame decernit to remove desist and ceis conforme to the precept of warning and executioun thair of or els to schaw ane reisonabill cause quhy thay sould not do the samin with certificatioun to thame and thay failzie that letters sall be direct simpliciter upone thame in the said mater; at the quhilk day gif they compeir not the Lordis Schereffis or uthers jugeis ordinar havand jurisdictioun sall decerne thame to remove desist and ceis fra thay landis; and gif thay compeir and instantly schawis sufficient tytill to bruke the landis in that caice the samin juge to proceid and do justice as accordis of the law: and gif the partie compeiris and schawis na thing bot makis allegiance and offeris him to impreif the indorsingis in that caice he sall not be hard in jugement bot gif he find sufficient cautioun to the warnar than instantlie that gif his allegiance being fundin relevant be not sufficientlie verifeit and provin be him that the proffeittis dampnage and interes quhilkis the said warnar or ony uthers havand interes hes sustenit or sall happen to sustene be the dilay of the foirsaid allegiance be refoundit to him. . . .¹ And als that na advocatioun of causis be taken be the Lordis fra the juge ordinar except it be for deidlie feid or the Schiref principall or the juge ordinar be the partie or the causis of the Lordis of Counsall and thair advocattis, scribis and members.

¹ The part omitted enforces the holding of Courts by the Ordinaries on each of the fifteen days after Trinity Sunday—an obsolete provision.

No. VIII.

Act of Sederunt anent Removings.—[14th December 1756.]

WHEREAS the difficulties that have occurred in actions of removing from lands have been found to be highly prejudicial to agriculture, and both to masters and tenants in respect that during the dependence of such actions the lands are neglected and deteriorated by the defender, and the heritor's security for his rent brought into danger, and tenants are discouraged from entering into tacks by the uncertainty of their attaining to possession, and by their finding the subject of their tack much deteriorated during the dependence of the process of removing against the preceding tenant: The Lords of Council and Session, resolving to remedy this great evil, do make the following regulations, viz. :—

1. That where a tenant is bound by his tack to remove without warning, at the issue or determination of his tack, it shall be lawful to the heritor or other setter of the tack, upon such obligation, to obtain letters of horning, and thereupon to charge the tenant with horning forty days preceding the term of Whitsunday in the year in which his tack is to determine, or forty days preceding any other term of Whitsunday thereafter: And upon production of such tack and horning duly executed to the deputy-sheriff or steward or their substitutes of the shire or stewartry where the lands lie, they are hereby authorised and required within six days after the term of removal appointed by the tack, to eject such tenant, and to deliver the possession void to the setter or those having right from him.

2. Where the tenant hath not obliged himself to remove without warning, in such case it shall be lawful to the heritor or other setter of the tack in his option either to use the order prescribed by the Act of Parliament made in the year 1555, intituled 'Act anent the warning of 'Tenants,' and thereupon pursue a warning and ejection, or to bring his action of removing against the tenant before the judge ordinary: And such action being called before the judge ordinary at least forty days before the term of Whitsunday, shall be held as equal to a warning execute in terms of the foresaid Act: And the judge shall thereupon proceed to determine in the removing in the terms of that Act in the same manner as if a warning had been executed in terms of the foresaid Act of Parliament.

3. Where a tack is assigned and the assignation not intimated by an instrument, or where the lands are subset in whole or in part to subtenants, such horning execute as aforesaid, or where process of removing and decret is obtained, or where warning in terms of the Act 1555 is used against the principal or original tacksman, the same shall be effectual against the assignees or subtenants, one or more, and the action of removing against the principal or original tacksman, and decret of removing following thereon, shall be effectual against such assignees and subtenants as aforesaid, and shall be sufficient ground of ejecting them, anything in the former practice to the contrary notwithstanding.

4. Where a tenant has irritated his tack by suffering two years' rent to be in arrear, it shall be lawful to the setter or heritor to declare the irritancy before the judge ordinary, and to insist in a summar removing

before him; and it shall be lawful to the sheriff or steward-depute or their substitutes to find the irritancy incurred, and to decern in the removing, any practice to the contrary notwithstanding.

5. Where a tenant shall run in arrear of one full year's rent, or shall desert his possession and leave it unlaboured at the usual time of labouring, in these, or either of these cases, it shall be lawful to the heritor or other setter of the lands to bring his action against the tenant before the judge ordinary, who is hereby empowered and required to decern and ordain the tenant to find caution for the arrears, and for payment of the rent for the five crops following or during the currency of the tack, if the tack is of shorter endurance than five years, within a certain time to be limited by the judge, and failing thereof, to decern the tenant summarily to remove, and to eject him in the same manner as if the tack were determined and the tenant had been legally warned in terms of the foresaid Act 1555.

6. and 7. *Superseded.*

No. IX.

1 & 2 VICTORIA, c. 119.

Sheriff Court Act, 1838.

Summary
complaint for
removing from
premises let
for less than
a year.

8. And whereas it is expedient to diminish the expense and delay with which the process of removing from houses and other heritable subjects of the rent hereinafter provided, let for any shorter period than a year, in Scotland, is attended; be it enacted, that where houses or other heritable subjects in Scotland are let for any shorter period than a year, at a rent of which the rate shall not exceed thirty pounds per annum, it shall be competent for any person, authorised by law to pursue a removing therefrom, to present a summary complaint to the sheriff of the territory, who shall order it to be served, and the defender to appear on such day as he may in each case think proper, in the form or to the effect of Schedule (A) annexed to this Act.

Defender
may repone
against decree
in absence.

9. And be it enacted, that if the defender shall fail to appear after being duly cited, the sheriff shall proceed to determine the cause in the same manner as if the defender had been personally present: Provided always, that where the decree shall have been pronounced in absence, and shall not have been carried into execution, the defender may present a petition to the sheriff for a further hearing of the cause, with evidence of intimation thereof having been made to the opposite party written thereon: and the sheriff, if he shall see cause, and upon payment by the defender to the complainer of such expenses as the sheriff may judge reasonable, may recall his decree, and proceed to hear and determine the cause as on the original complaint without delay; and provided also, that where decree shall be pronounced in absence, the sheriff may give such order for preservation of the goods and effects of the defender as he may deem proper.

Warrant to
cite witnesses,
and provision
as to fees.

10. And be it enacted, that the complaint or copy thereof served on the defender shall be a sufficient warrant to any sheriff-officer to cite witnesses or havers for either party to appear on the day of trial, and give evidence in such summary cases of removing; and the fees allowed to the clerk or officers of Court on such complaint and proceedings shall be

the same as those allowed on summonses and similar proceedings in small-debt causes in Sheriff Courts in Scotland, under an Act passed during the last session of Parliament, intituled 'An Act for the more effectual recovery of small debts in Sheriff Courts, and for regulating the establishment of Circuit Courts for the trial of small-debt causes by the sheriffs in Scotland': Provided always, that the travelling expenses of officers and their assistants under the said recited Act, and this Act shall not be allowed for more than the distance from the residence of the officer employed to the place of execution or service, in case such distance shall be less than from the Court-house to such place, and the sheriff shall have power to modify such expenses in case the officer residing nearest to the place of execution or service shall not be employed; and provided also, that such travelling expenses shall not be allowed against an opposite party for a greater distance than twelve miles.

11. And be it enacted, that the citation and further procedure in such summary removings shall, in so far as not provided for by this Act, be the same as those established by the said recited Act, for the trial of small-debt causes in Sheriff Courts; and where decree of removing is pronounced it shall be in the form or to the effect of the said Schedule (A) and shall have the full force of a decret of removing and warrant of ejection; and the judgments to be pronounced in such summary actions of removing shall be final, and not subject to review, either in the Circuit Court of Justiciary or in the Court of Session.

Citation and further procedure in removings to be the same as provided for small-debt causes. Judgments to be final.

12. And be it enacted, that the sheriff may, of consent of parties, or where the ends of justice require it, adjourn the further hearing of or procedure in any summary process of removing raised under the authority of this Act, and he may likewise order written answers to be given in to the complaint; and all such orders shall be final, without being subject to appeal or advocacy: Provided always, that the sheriff shall in all such cases where the defences cannot be instantly verified ordain the defender to find caution for violent profits.

Sheriff may adjourn the cause.

13. And be it further enacted, that in all cases where the defender has found caution he shall be allowed to give in written answers to the complaint; and in all cases where written answers shall be ordered such cases shall thereafter be conducted, as nearly as may be, according to the forms in use in ordinary processes of removing, and the judgment of the sheriff therein shall be subject to review in common form.

Where defender has found caution he may give in written answers to complaint.

14. And be it enacted, that no person shall be exempt from the jurisdiction of the sheriff in any process of removing raised under the authority of this Act, on account of privilege, or being a member of the College of Justice or otherwise.

Members of College of Justice not exempt.

SCHEDULES referred to in the foregoing Act.

SCHEDULE (A).

No. 1.

Form of Summary Complaint.

Unto the honourable the sheriff of the county of

Complains A.B. [name and design the complainer] against C.D. [name and design the defender], that the complainer [or his author, as the case may be] let to the said defender [or his author, as the case may

be], a dwelling-house, garden, and pertinents [or other subjects, as the case may be], situate in , for the period from to ; that the said defender is bound to remove from the said subjects at the date last mentioned, and it is necessary to obtain decree of removing against him [or as the case may be, refuses or delays to remove therefrom, although the period of his lease has expired]; therefore decret ought to be granted for removing and ejecting the said defender, his family, subtenants, cottars, and dependants, with their goods and gear, furth and from the said subjects [here insert the date at which the removal or ejection is sought for, as the case may be], that the complainer or others in his right may then enter to and possess the same. [If expenses are sought, add, and the said defender ought to be found liable in expense of process and dues of extract.]
[Signature of the party or agent.]

No. 2.

Form of Warrant thereon.

The sheriff grants warrant to cite the said defender to compare personally before him at the Court-house [or elsewhere, as the case may be], upon the [insert the day of the month and hour, if need be], to answer the foregoing complaint, under certification of being held as confessed; ordains such citation to be made at least [state the period which the sheriff may fix to intervene betwixt the citation and diet of compareance], previous to the said diet of compareance; and grants warrant to cite witnesses for both parties to appear, time and place foresaid, to give evidence in the said matter, under the pains of law. Given under the hand of the clerk of Court at the day of the Sheriff-clerk.

No. 3.

Form of Citation for Defender.

C.D., defender above designed, you are hereby summoned to appear and answer before the sheriff in the matter complained of, and that at [here specify time and place], under certification of being held as confessed.

This notice is served upon the day of by me, Sheriff-officer.

No. 4.

Form of Execution of Citation.

Upon the day of I duly summoned the above-designed C.D., defender, to appear and answer before the sheriff in the matter, and at the time and place, and under the certification above set forth. This I did by delivering a copy of the above complaint, with a citation thereto annexed, to the said defender personally [or otherwise, as the case may be].

Sheriff-officer.

No. 5.

Form of Decreet and Warrant of Ejection.

At , the day of , the which day the sheriff [in absence of the defender, or having heard parties, as the case may be], decerns and grants warrant for removing and ejecting the said

C.D., defender, and others mentioned in the complaint, from the subjects therein specified, such ejection not being sooner than [*here insert the time appointed for removal, and whether after a charge on such inducive as may be deemed proper, or instantly*], finds the said defender liable in expenses [*or otherwise, as the case may be*], and decerns.

[*Sheriff's signature.*]

Note.—The whole of the above to be in the same paper.

No. X.

SHERIFF COURT ACT, 1853 (16 & 17 VICT. c. 80, sects. 29-31).

29. And with respect to actions of removing at any time, be it enacted as follows:—

Proceedings in
actions of
removing.

It shall be competent to raise a summons of removing at any time, provided there be an interval of at least forty days between the date of the execution of the summons and the term of removal or where there is a separate ish as regards lands and houses, or otherwise, between the date of the execution of the summons and the ish which is first in date.

30. Where any lands or heritages are held under a probative lease, specifying a term of endurance, such lease, or an extract thereof from the books of any Court of record, shall have the same force and effect in every respect as any extract decree of removing obtained in any ordinary action of removing at the instance of the party granter of such lease, or in the right of the granter of such lease, against the party in possession under such lease, whether such party in possession be the lessee named in such lease or not, decerning such party in possession, his family, subtenants, cottars, and dependants, with their goods and gear, to be removed and ejected from the said lands or heritages at the term or terms corresponding to the expiration of the term or terms of endurance specified in such lease; and such lease or extract thereof shall, along with a written authority signed by the landlord or his factor or agent, be a sufficient warrant to any sheriff-officer or messenger-at-arms of the county within which such lands or heritages are situate to remove and eject such party in possession, and his foresaids, from such lands or heritages on the elapse of such specified term or terms respectively, and to return an execution thereof in common form: Provided always, that previous notice to remove shall be given to such party in possession at least forty days before the expiration of the term of endurance specified in such lease, or where the lease has a separate ish as regards land and houses or otherwise, at least forty days before that ish which is first in date, by causing to be delivered to such party in possession, or to be left at his ordinary dwelling-house, or to be transmitted to his known address through the post-office, previous to the commencement of such period of forty days, a notice by a sheriff-officer of the county in which such lands or heritages are situate, or messenger-at-arms, in the form in Schedule (I) annexed to this Act; and a certificate endorsed on such lease or extract that such notice has been duly given, signed by a sheriff-officer of such county, or messenger-at-arms, and attested by one witness, in the form in Schedule (J) annexed to this Act, or an acknowledgment to that effect endorsed thereon by such party in possession himself, or

Lease containing
obligation
to remove,
equivalent
to decree
of removing,
provided forty
days' notice be
given.

by his known agent on his behalf, shall be sufficient evidence that such notice has been given : Provided also, that no such removal or ejectment by virtue of this enactment shall be competent after six weeks have elapsed from the expiration of the term of endurance specified in such lease, or where the lease has a separate ish as regards land and houses or otherwise, after six weeks have elapsed from that ish which is last in date ; and provided further, that nothing herein contained shall be construed to prevent any proceedings under this enactment from being brought under suspension in common form.

Letter of removal granted by tenant equivalent to decree of removing, provided forty days' notice be given.

31. Where any tenant in possession of any lands or heritages shall, whether at the date of entering upon his lease, or at any other time, grant a letter of removal, either holograph or attested by one witness, in the form in Schedule (K) annexed to this Act, such letter of removal shall have the same force and effect in every respect as any extract decree of removing obtained in any ordinary action of removing at the instance of the party to whom such letter of removal is granted, or of the party in his right against the party granter of such letter of removal, or the party in his right as tenant, decerning such party granter of such letter, or such party in his right, as the case may be, his family, subtenants, cottars and dependants, with their goods and gear, to be removed and ejected from the said lands and heritages at the term or terms of removal respectively specified in such letter of removal ; and such letter of removal shall be a sufficient warrant to any sheriff-officer of the county within which such lands or heritages are situate to remove and eject such party granter of such letter of removal, or such party in his right, and his foresaids, from such lands and heritages, on the elapse of such specified term or terms respectively, and to return an execution thereof in common form : Provided always, that where such letter of removal shall bear date more than six weeks before the term of removal, or the ish first in date, specified in such letter of removal, previous notice to remove shall be given to the party granter of such letter of removal, or to such party in his right, at least forty days before such term of removal, or where such letter of removal specifies a separate ish as regards lands and houses or otherwise, at least forty days before that ish which is first in date, by causing to be delivered to such party granter of such letter of removal, or to such party in his right, or to be left at his ordinary dwelling-house, or to be transmitted to his known address through the post-office, previous to the commencement of such period of forty days, a notice by a sheriff-officer of the county in which such lands or heritages are situate, in the form of Schedule (I) annexed to this Act ; and a certificate endorsed upon such letter of removal that such notice has been duly given, signed by a sheriff-officer of such county, and attested by one witness, in the form of Schedule (J) annexed to this Act ; or an acknowledgment to that effect endorsed thereon by the granter of such letter of removal, or other party in his right, or by the known agent of the granter of such letter of removal, or other party on his behalf, shall be sufficient evidence that such notice has been given : Provided also, that no such removal or ejectment by virtue of this enactment shall be competent after six weeks have elapsed from the expiration of the term of endurance specified in such letter of removal, or where such letter of removal has a separate ish as regards lands and houses or otherwise, after six weeks have elapsed, from that ish which is last in date ; and provided further, that nothing herein con-

tained shall be construed to prevent any proceedings under this enactment from being brought under suspension in common form.

SCHEDULE (I).

Notice to Remove.

You are required to remove from the farm of [Place and date.]
[insert name by which
usually known], at the term of next, as to the houses and
grass, and at the separation of the crop from the ground as to the arable
land [or as the case may be], in terms of the lease thereof [or in terms
of your letter of removal], dated

E.F., sheriff-officer.

[Address] G.H. [design him].

SCHEDULE (J).

Certificate of Notice to Remove.

I, E.F., sheriff-officer of the county of , certify that
on the day of , notice to remove, in terms of this lease
[or letter of removal] at next [according to the terms of the notice],
was, in presence of L.M. [design him], subscribing witness, given by me
to G.H., the tenant, by delivering such notice to him personally [or by
leaving such notice at his ordinary dwelling-house at , or by
transmitting such notice to him through the post-office to his known
address, as follows: (insert address to which notice sent)].

L.M., witness.

E.F., sheriff-officer.

SCHEDULE (K).

Letter of Removal.

Sir,—I am to remove from the farm of [Place and date.]
[insert name by which
usually known], at the term of , eighteen hundred and
 , as to the houses and grass, and at the separation of
the crop from the ground as to the arable land [or as the case may be].
—I am, your obedient servant [signed by the tenant]. [Address.]

Note.—If this letter is not holograph of the granter of it, it must be attested by one witness, thus,—L.M., witness.

No. XI.

49 & 50 VICTORIA, c. 50.

An Act to amend the Law relating to the Terms of Removal from Houses in Scotland.—[25th June 1886.]

WHEREAS in many counties and burghs in Scotland a custom exists whereby for the purpose of a tenant's entry to or removal from a house a period beyond the date of the legal term of entry or removal is allowed within which such entry or removal may take place:

And whereas the period so allowed is not uniform but varies according to local usage:

And whereas such want of uniformity is productive of great inconvenience, and it is expedient that the terms for such entry and removal should be uniform :

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Short title and extent of Act.

1. This Act may be cited as the 'Removal Terms (Scotland) Act, 1886,' and shall extend to Scotland only.

Repeal of 44 & 45 Vict. c. 39.

2. The Removal Terms (Burgths) Scotland Act, 1881, is hereby repealed.

Definitions.

3. In this Act the following expressions shall have the following meanings :

'House' shall mean a dwelling-house, shop, or other building and their appurtenances, and shall include a dwelling-house or building let along with land for agricultural or other purposes :

'Burgh' shall mean royal burgh, parliamentary burgh, or any populous place, the boundaries whereof have been fixed and ascertained under the General Police and Improvement (Scotland) Act, 1862, and subsequent Acts :

'Lease' shall include tack and set, and shall apply to any lease, tack, or set, whether constituted by writing or verbally, or by tacit relocation and of whatever duration :

'Tenant' shall mean a tenant under any lease as defined by this Act: and

'Person' shall mean any person or individual, and shall apply to and include companies and corporations.

Terms of entry and removal from houses.

4. Where under any lease entered into after the passing of this Act, the term for a tenant's entry to, or removal from, a house shall be one or other of the terms of Whitsunday or Martinmas, the tenant shall, in the absence of express stipulation to the contrary, enter to, or remove from, the said house (any custom or usage to the contrary notwithstanding) at noon on the twenty-eight day of May, if the term be Whitsunday, or at noon on the twenty-eighth day of November, if the term be Martinmas, or on the following day at the same hour, where the said terms fall on a Sunday.

Notwithstanding anything in this Act contained, in all cases in which warning is required forty days before a Whitsunday or Martinmas term of removal, such warning shall be given forty days before the fifteenth day of May and the eleventh day of November respectively.

Period of notice of removal in certain cases.

5. Where a house, other than a dwelling-house or building let along with land for agricultural purposes, is let for any period not exceeding four calendar months, notice of removal therefrom shall, in the absence of express stipulation, be given as many days before the date of lease as shall be equivalent to at least one-third of the full period of duration of the lease.

Notice of removal by registered letter.

6. Notice of removal from a house, other than a dwelling-house or building let along with land for agricultural purposes, may hereafter be given by registered letter, signed by the person entitled to give such notice, or by the law-agent or factor of such person, posted at any post-office within the United Kingdom, in time to admit of its being delivered at the address thereon, on or prior to the last date upon which by law such notice of removal must be given, addressed to the person

entitled to receive such notice, and bearing the particular address of such person at the time, if the same be known, or, if the same be not known, then the last known address of such person.

No. XII.

49 & 50 VICTORIA, c. 29.

[CROFTERS HOLDINGS (SCOTLAND) ACT, 1886.]

ARRANGEMENT OF SECTIONS.

I. *Security of Tenure.*

Section

1. A crofter shall not be removed except for breach of statutory conditions.
2. Provision for resumption by landlord.
3. Removal of crofter for breach of conditions.

II. *Rent.*

4. Present rent.
5. Rent altered by agreement.
6. Fixed rent.

III. *Renunciation of Tenancy.*

7. Renunciation of tenancy.

IV. *Compensation for Improvements.*

8. Compensation to crofter for improvements on removal.
9. Compensation to cottar for improvements on removal.
10. Principle of valuation.

V. *Enlargement of Holdings.*

11. Application by crofters for enlargement.
12. Intimation to landlords.
13. Available land.
14. Deduction from rent in case of lands held for sporting purposes.
15. Assigned land.
16. Bequest of holding.

VI. *Crofters Commission.*

17. Appointment of three Commissioners.
18. Commission to make report of their proceedings.
19. Area covered by the Act.
20. Procedure in fixing fair rent.
21. Procedure in enlarging holdings.
22. Duration of powers as to enlargement of holdings.
23. Delegation of Commissioners' duties.
24. Taking evidence and expenses before Crofters Commission.
25. Finality of Commissioners' decision.
26. Use of Sheriff Court-houses.

27. Record of proceedings; transmission of applications by sheriff-clerk ; sheriff-clerk's remuneration.
28. Execution of orders made by Commission.
29. Forms of procedure.
30. Sole arbiter may be chosen.
31. Saving of 46 & 47 Vict. c. 62.
32. Loans for the purchase and equipment of fishing-boats.
33. Saving in case of holdings in possession of servants.
34. Definitions.
35. Short title.

SCHEDULE.

An Act to amend the Law relating to the Tenure of Land by Crofters in the Highlands and Islands of Scotland, and for other purposes relating thereto.—[25th June 1886.]

WHEREAS it is expedient to amend the law relating to the tenure of land by crofters in the Highlands and Islands of Scotland :

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

I. *Security of Tenure.*

A crofter shall not be removed except for breach of statutory conditions.

1. A crofter shall not be removed from the holding of which he is tenant except in consequence of the breach of one or more of the conditions following (in this Act referred to as statutory conditions), but he shall have no power to assign his tenancy.

- (1) The crofter shall pay his rent at the terms at which it is due and payable :
- (2) The crofter shall not execute any deed purporting to assign his tenancy :
- (3) The crofter shall not, to the prejudice of the interest of the landlord, persistently injure the holding by the dilapidation of buildings or, after notice has been given by the landlord to the crofter not to commit, or to desist from, the particular injury specified in such notice, by the deterioration of the soil :
- (4) The crofter shall not, without the consent of his landlord in writing, subdivide his holding or sublet the same or any part thereof, or erect or suffer to be erected thereon any dwelling-house otherwise than in substitution for those already upon the holding at the time of the passing of this Act :
- (5) The crofter shall not persistently violate any written condition signed by him for the protection of the interest of the landlord or of neighbouring crofters which is legally applicable to the holding, and which the Crofters Commission shall find to be reasonable :
- (6) The crofter shall not do any act whereby he becomes notour bankrupt within the meaning of the Bankruptcy (Scotland) Act, 1856, and the Debtors (Scotland) Act, 1880, and shall not execute a trust-deed for behoof of creditors :
- (7) The landlord, or any person or persons authorised by him in that behalf (he or they making reasonable compensation for any

19 & 20 Vict.
c. 79.
43 & 44 Vict.
c. 34.

damage to be done or occasioned thereby), shall have the right to enter upon the holding for any of the purposes following (that is to say):

Mining or taking minerals, or digging or searching for minerals; Quarrying or taking stone, marble, gravel, sand, clay, slate, or other workable mineral;

Cutting or taking timber or peats, excepting timber and other trees planted by the crofter or his predecessors in the holding, being of the same family, or that may be necessary for ornament or shelter, and excepting also such peats as may be required for the use of the holding;

Opening or making roads, fences, drains, and watercourses;

Passing and repassing to and from the shore of the sea or any loch with or without horses and carriages for exercising any right of property or other right belonging to the landlord;

Viewing or examining at reasonable times the state of the holding and all buildings or improvements thereon;

Hunting, shooting, fishing, or taking game or fish, wild birds, or vermin. The word 'game' for the purposes of this subsection means deer, hares, rabbits, pheasants, partridges, quails, landrails, grouse, blackgame, capercaillie, ptarmigan, woodcock, snipe, wild duck, widgeon, and teal;

And the crofter shall not obstruct the landlord, or any person or persons authorised by him in that behalf as aforesaid, in the exercise of any right reserved or conferred by this subsection.

(8) The crofter shall not on his holding, without the consent of his landlord, open any house for the sale of intoxicating liquors.

2. Notwithstanding the provisions contained in the preceding section, the Crofters Commission may, on the application of the landlord, and upon being satisfied that he desires to resume the holding or part thereof, for some reasonable purpose, having relation to the good of the holding or of the estate, including the using, letting, or feuing the land proposed to be resumed, for the building of dwellings, or for small allotments for fishermen, or for harbours, piers, boat shelters, or other buildings connected with the fishing industry, or for churches or other places of religious worship, or for schools, or for planting or for roads practicable for carriages from the croft or crofts to the high-road or the sea-shore, authorise the resumption thereof by the landlord upon such terms and conditions as the Crofters Commission shall think fit, and may require the crofter to surrender his holding, in whole or in such part, to the landlord, upon the landlord making adequate compensation to the crofter, either by letting to him other land of equivalent value in the neighbourhood, or by reduction of rent, or by compensation in money, or otherwise as the Crofters Commission shall determine.

Provision for
resumption by
landlord.

3. When one year's rent of the holding, but less than two years' rent, is due and unpaid, the crofter shall be liable to be removed in manner provided by section twenty-seven of the Agricultural Holdings (Scotland) Act, 1883.

Removal of
crofter for
breach of
conditions.
46 & 47 Vict.
c. 62.

When two years' rent of the holding is due and unpaid, or when the crofter has broken any other of the statutory conditions, he shall forfeit his tenancy, and shall be liable to be removed in manner provided by the fourth section of the Act of Sederunt anent removing of

the fourteenth day of December one thousand seven hundred and fifty-six.

II. *Rent.*

Present rent. 4. The rent payable, as one of the statutory conditions, shall be the present rent, that is to say, the yearly rent including money and any prestations other than money, payable for the year current at the passing of this Act, unless and until the present rent is altered in manner provided by this Act.

Rent altered by agreement. 5. The rent may be altered by agreement between the landlord and the crofter to such amount and for such period as may be agreed on; and the rent so agreed on shall be the rent payable by the crofter so long as such agreement subsists, and after the expiry thereof so long as no different rent shall have been fixed by the Crofters Commission upon the application of the landlord or the crofter, and so long as no new agreement between the landlord and the crofter shall have been made.

Fixed rent. 6. (1) The landlord or the crofter may apply to the Crofters Commission to fix the fair rent to be paid by such crofter to the landlord for the holding, and thereupon the Crofters Commission, after hearing the parties and considering all the circumstances of the case, holding, and district, and particularly after taking into consideration any permanent or unexhausted improvements on the holding and suitable thereto which have been executed or paid for by the crofter or his predecessors in the same family, may determine what is such fair rent, and pronounce an order accordingly.

(2) The rent fixed by the Crofters Commission (in this Act referred to as the fixed rent) shall be deemed to be the rent payable by the crofter as from the first term of Whitsunday or Martinmas next succeeding the decision of the Crofters Commission, and shall come in place of the present rent, and, save by mutual agreement, the fixed rent shall not be altered for a period of seven years from such term.

(3) Where the Crofters Commission shall fix a rent which shall be less in amount than the present rent, the crofter shall be entitled, at the next payment of rent, to deduct from the amount of the fixed rent such sum or sums as he may have paid over and above the amount of the fixed rent in respect of the period between the date of the notice of application to fix the fair rent and the date when such rent was fixed.

(4) When an application is lodged with the Crofters Commission to fix a fair rent, it shall be in the power of the Crofters Commission, either under the same or under another application of the crofter, to sist all proceedings for the removal of the crofter in respect of non-payment of rent till the said application is finally determined, upon such terms as to payment of rent or otherwise as they shall think fit.

(5) In the proceedings on such application the Crofters Commission shall take an account of the amount of arrears of rent due or to become due before the application is finally determined, and may take evidence of all the circumstances which have led to such arrears, and shall decide whether, in view of such circumstances, the whole or what part of such arrears ought to be paid, and whether in one payment or by instalments, and at what dates the same should be paid, and the amount and dates so fixed shall be deemed to be the total amount

of such arrears due by the crofter, and the terms at which the same become payable.

III. *Renunciation of Tenancy.*

7. A crofter shall be entitled, upon one year's notice in writing to the landlord, to renounce his tenancy as at any term of Whitsunday or Martinmas.

Renuncia-
tion of
tenancy.

IV. *Compensation for Improvements.*

8. When a crofter renounces his tenancy or is removed from his holding, he shall be entitled to compensation for any permanent improvements, provided that—

Compensation
to crofter for
improvements
on removal.

- (a) The improvements are suitable to the holding ;
- (b) The improvements have been executed or paid for by the crofter or his predecessors in the same family.
- (c) The improvements have not been executed in virtue of any specific agreement in writing under which the crofter was bound to execute such improvements.

9. When a cottar if not paying rent is removed from his dwelling and any land or buildings occupied by him in connection therewith, or if paying rent renounces his tenancy or is removed, he shall be entitled to compensation for any permanent improvements, provided that—

Compensation
to cottar for
improvements
on removal.

- (a) Such improvements are suitable to the subject ;
- (b) Such improvements shall have been executed or paid for by the cottar or his predecessors in the same family ;
- (c) Such improvements have not been executed in virtue of any specific agreement in writing under which the cottar was bound to execute such improvements.

The provisions of the preceding section and of this section shall not apply to any buildings erected by a crofter or a cottar in violation of any interdict or other judicial order.

10. Improvements shall be valued under this Act at such sum as fairly represents the value of the improvement to an incoming tenant, provided that in fixing the amount of compensation payable, the value of any assistance or consideration which may be proved to have been given by the landlord or his predecessors in title, in respect of such improvements shall be taken into account, and deducted from such compensation, and the value of any deterioration committed or permitted by the tenant within the four years preceding shall also be deducted from the said compensation.

Principle of
valuation.

V. *Enlargement of Holdings.*

11. It shall be lawful for any five or more crofters resident on neighbouring holdings in a crofting parish, where any landlord or landlords after application made to him or them have refused to let to such crofters available land on reasonable terms for enlarging the holdings of such crofters, to apply to the Crofters Commission setting forth that in the said parish or in an adjacent crofting parish there is land available for the enlargement of such holdings which they are willing to take on lease, but which the landlord or landlords refuse to let on reasonable terms ; that is to say, on such terms as are usually obtained in the letting of land of the like quality, and similarly situated in the same

Application by
crofters for
enlargement.

district, for other purposes than that of a deer forest, or of a grouse moor, or other sporting purpose.

Intimation to
landlords.

12. The Crofters Commission shall, upon receiving such an application as aforesaid, intimate the same to the landlord or landlords therein alleged to have refused to let available land for the enlargement of such holdings as aforesaid, and shall afford such landlord or landlords, and the crofters by whom the application is made, an opportunity of being heard thereupon, and shall ascertain as far as possible how far the small size of the holdings has been due to the action of the landlord or of the crofters, and shall make such other inquiry as to them shall appear necessary or proper; and if they are satisfied—

- (1) That there is land in the parish, or in an adjacent crofting parish, available for enlarging the holdings of the said crofters, but that the landlord or landlords refuse to let the same for that purpose on reasonable terms;
- (2) That the applicants are willing and able to pay a fair rent therefor, and that in the event of an order for the letting thereof being made, the applicants are able properly to cultivate the same in so far as it consists of arable land, and properly to stock the same in so far as it consists of pasture land;

the Crofters Commission may make an order for a lease of the said land, or such part or parts thereof as they may think proper, to the applicants, or one or more of them, at a fair rent, and upon such terms and conditions as the Crofters Commission shall consider just.

It shall be competent for the Crofters Commission by an order under this section to provide, if this shall appear to them to be just and expedient, for admitting the crofters who have applied as aforesaid, to participate in common pasture occupied by other crofters, or for conferring upon the applicants rights of pasturage common as among themselves over available land specified in the order, upon such terms and conditions as the Crofters Commission shall determine.

It shall be competent for the Crofters Commission to draw up a scheme regulating the use by the crofters on the same estate, of seaweed for the reasonable purposes of their holdings, peat bogs, and heather or grass used for thatching purposes, and to include the charge for all these in the fixed rent.

Available land.

13. (1) Land shall not be deemed available land for the purposes of this Act unless it lies contiguous or near to land already in the occupancy of the crofters making the application, and belongs to the same landlord or landlords as the land occupied by the said crofters:

- (2) If the land is subject to an existing lease for a term of years, entered into prior to the commencement of this Act (not being a lease for the purposes of a deer forest, or of a grouse moor, or for other sporting purpose), it shall not be competent to assign any part thereof for the enlargement of the holdings of the crofters who have made the application, unless with the assent of the landlord or landlords and of the tenant or tenants of such land, and upon such terms as such landlord or landlords and tenant or tenants shall voluntarily agree to.

- (3) It shall not be competent for the Crofters Commission to assign land for the enlargement of the crofters' holdings—

(a) If the land forms part of any garden, policy, park, plantation, or other wood; or,

- (b) If the land forms part of any farm, whether subject to a lease or not, unless the Crofters Commission are satisfied that the part proposed to be assigned for the enlargement of the crofters' holdings, can be so assigned without material damage to the letting value of the remainder ;
 - (c) If the land forms part of an existing farm or other holding, unless the rent or annual letting value of such farm or holding shall exceed one hundred pounds ;
 - (d) If the land is arable or improved pasture in the immediate vicinity of a residence or farm steading, or is land which could not be assigned for the enlargement of the crofters' holdings without substantially impairing the amenity of such residence or farm steading ;
 - (e) If the land form part of a deer forest, and if the assignation of such land for the purposes of this Act would seriously impair the use of the remainder as a deer forest, and would act injuriously on the prosperity of the inhabitants generally of the district in which such deer forest is situated.
- (4) The aggregate value of the land assigned for the enlargement of the crofters' holdings shall not exceed one-third of the rent or annual letting value of the farm or other holding from which it is taken, when the annual value of the holding is between one hundred pounds and one hundred and fifty pounds, or one-half when the annual value is above one hundred and fifty pounds and below three hundred pounds, or two-thirds when the annual value of the holding is above three hundred pounds.
- (5) It shall not be competent for the Crofters Commission to grant the application of the crofters for the enlargement of their holdings, to the extent or effect of raising the annual value of their holdings respectively to a higher amount than fifteen pounds each.
14. Where a portion of any land held under lease for the purposes of a deer forest or of a grouse moor, or for other sporting purpose, is assigned by the Crofters Commission for the enlargement of the holding or holdings of a crofter or crofters under this Act, the Crofters Commission shall, when they so assign such land, fix the amount of the deduction (if any) which in their judgment ought to be made from the rent payable by the tenant under the lease to the landlord, in respect of the portion of the land held under the same having been assigned as aforesaid, and thereafter the tenant under the lease shall be liable to the landlord only in the balance of the rent thereby stipulated, after deduction of the sum so fixed. Deduction from rent in case of lands held for sporting purposes.
15. Land assigned by the Crofters Commission under the authority of this Act shall be deemed to be part of the holding or holdings to which it is so assigned, and shall be subject to the provisions of this Act relative to crofters' holdings. Assigned land.
16. A crofter may, by will or other testamentary writing, bequeath his right to his holding to one person, being a member of the same family ; that is to say, his wife or any person who, failing nearer heirs, would succeed to him in case of intestacy (hereinafter called the 'legatee'), subject to the following provisions : Bequest of holding.
- (a) The legatee shall intimate the testamentary bequest to the landlord or his known agent within twenty-one days after the death

of the crofter, unless he is prevented by some unavoidable cause from making intimation within that time, and in that event he shall make intimation as soon as possible thereafter :

- (b) Intimation to the landlord or his known agent by the legatee shall import acceptance of the crofter's right to the holding by the legatee :
- (c) Within one month after intimation has been made to the landlord or his known agent, he may intimate to the legatee that he objects to receive him as crofter in the holding :
If the landlord or his known agent makes no such intimation within one month, the legatee shall come into the place of the crofter in the holding as from the date of the death of the deceased crofter :
- (d) If the landlord or his known agent intimates that he objects to receive the legatee as crofter in the holding, the legatee may present a petition to the sheriff, praying for decree declaring that he is the crofter therein as from the date of the death of the deceased crofter, of which petition due notice shall be given to the landlord, who may enter appearance and state his grounds of objection ; and if any reasonable ground of objection is established to the satisfaction of the sheriff, he shall declare the bequest to be null and void ; but otherwise he shall decern and declare in terms of the prayer of the petition :
- (e) The decision of sheriff under such petition as aforesaid shall be final :
- (f) Where the legatee shall have presented a petition to the sheriff as aforesaid, the legatee, pending any proceedings, shall have possession of the holding unless the sheriff shall otherwise direct on cause shown :
- (g) If the legatee shall accept the bequest, and the bequest is not declared to be null and void as aforesaid, the legatee shall be entitled to possess the holding on the same terms and conditions as if he had been the nearest heir of the crofter :
- (h) If the legatee does not accept the bequest, or if the bequest is declared to be null and void as aforesaid, the right to the holding shall descend to the heir of the crofter, in the same manner as if the bequest had not been made.

Provided always, that in the case of any legatee or heir-at-law more distant than wife, son, grandson, daughter, grand-daughter, brother, or son-in-law, it shall be competent to the landlord on his own part, or on the part of neighbouring crofters, to represent that, for the purpose of enlarging their holding or holdings, the holding ought to be added to them ; and in all cases in which the sheriff shall determine in favour of such representation, the heir, or the legatee, as the case may be, who, but for such determination, would have succeeded to the holding, shall have right to any claim of compensation for improvements thereon which would have been competent to the deceased crofter if he had been removed at the date of his death : Provided further, that if in any such case the landlord shall fail, within six months after the determination of the sheriff, to add the holding to one or more of the adjoining holdings, it shall be competent to the neighbouring crofters to apply to the Crofters Commission, who shall make an order assigning the holding to one or more of the neighbouring crofters for the enlargement of his or their holding or holdings.

VI. *Crofters Commission.*

17. With a view to the execution of this Act, it shall be lawful for Her Majesty to appoint three Commissioners, in this Act designated 'the Crofters Commission.'

Appointment of three Commissioners.

One of the said Commissioners shall be a person who can speak the Gaelic language.

One of the said Commissioners shall be a person who at the date of his appointment shall be an advocate of the Scottish bar of not less than ten years' standing.

If any vacancy occurs in the office of Commissioner, by death, resignation, incapacity, or otherwise, Her Majesty may by warrant under the royal sign manual appoint some other qualified person to fill the vacancy.

It shall be the duty of the Crofters Commission to hold sittings in such places to which this Act applies, and in such order and subject to such regulations as the Secretary for Scotland may prescribe.

The Crofters Commission may appoint such officers, including valuers and assessors, as also clerks or persons holding inferior situations, at such remuneration as the Treasury may sanction, and the Commissioners shall receive such remuneration as the Treasury may sanction out of moneys to be provided by Parliament.

18. The Crofters Commission shall once in every year after the year one thousand eight hundred and eighty-six make a report to the Secretary for Scotland as to their proceedings under this Act, and every such report shall be presented to Parliament.

Commission to make report of their proceedings.

19. The Crofters Commission after due inquiry shall ascertain what parishes or islands or districts forming aggregates of parishes, within the counties of Argyll, Inverness, Ross and Cromarty, Sutherland, Caithness, Orkney, and Shetland, arecrofting parishes, or aggregates ofcrofting parishes, and shall determine that this Act shall apply to such parishes.

Area covered by the Act.

Such determination shall be reported to the Secretary for Scotland in one or more reports, and may be confirmed by him with or without modification.

From and after the date of such confirmation, this Act shall apply to the parishes included in the determination.

Every such determination, when confirmed, shall be laid before Parliament.

Within the parishes to which this Act is determined to apply as aforesaid, this Act shall apply to every crofter who is the tenant of a holding at the passing of this Act, and to his heirs and legatees, in the same manner as if the tenancy were a lease.

In the event of the heirs-at-law of the crofter being heirs-portioners, the eldest of such heirs-portioners shall succeed to the tenancy without division.

20. When an application is made to the Crofters' Commission to fix a fair rent, intimation thereof shall be given to the other party interested in the holding, landlord or crofter, as the case may be, and the Crofters Commission shall appoint a time and place at which parties shall be heard in reference to the matter of the application.

Procedure in fixing fair rent.

It shall be competent for the Commissioners in case of such application to visit the holding, if they think fit, as also to call in the aid of an assessor or assessors, specially qualified by local knowledge or otherwise,

and to hear the case wholly or partially with the aid of such assessor or assessors, or they may obtain a valuation or report from a competent valuer or valuers appointed by them for the purpose.

Procedure in
enlarging hold-
ings.

21. When an application for an enlargement of crofters' holdings is made to the Crofters Commission, they shall intimate such application to the landlord or landlords, as also to the tenant or tenants, and any other person or persons in the occupation of or otherwise interested in the land proposed to be added to the crofters' holdings, including heritable creditors holding securities over the same, and shall give notice of the time or times, and place or places, at which parties will be heard in regard to the matter of the application.

It shall be competent to the Commissioners to visit the place to which the application relates, and also if they shall think fit, to call in the assistance of an assessor or assessors, or of a valuer or valuers, as hereinbefore provided.

In assigning land for the enlargement of crofters' holdings, it shall be competent for the Commissioners, if they think fit, to make such order or orders with respect to the erection and maintenance of fencing of the said land as they shall consider necessary or expedient, and to decern that the expense of such erection and maintenance shall be paid by the person or persons interested, as the Crofters Commission shall consider just, having regard to the advantage accruing to the said person or persons respectively from such fencing.

It shall also be competent to the Commissioners to decide summarily any questions relating to the boundaries or marches between crofters' holdings, including grazings, or between crofters' holdings, including grazings and adjoining lands.

In the event of any dispute arising as to whether a person is a 'crofter' within the meaning of this Act, it shall be competent for the Commissioners to determine such question summarily.

Duration of
powers as to
enlargement
of holdings.
Delegation of
Commis-
sioners' duties.

22. The powers of the Crofters Commission with respect to the enlargement of crofters' holdings, shall continue for a period of five years from the passing of this Act.

23. In executing the provisions of this Act, it shall be competent for the Crofters Commission to delegate the duties thereby prescribed, to two of their number, but any determination arrived at by such two Commissioners shall be subject to review, upon appeal, by the whole three Commissioners.

Taking evi-
dence and
expenses before
Crofters Com-
mission.

24. In any application under this Act it shall be competent to any of the parties thereto to demand, and for the Crofters Commission to order that the evidence shall be taken upon oath, and it shall also be competent to the Crofters Commission to make such order as to expenses as they think fit.

Finality of
Commis-
sioners deci-
sion.

25. The decision of the Crofters Commission in regard to any of the matters committed to their determination by this Act shall be final.

Use of Sheriff-
Court-houses.

26. The Crofters Commission may use, free of charge, for holding its sittings the Court-houses commonly used as Sheriff Courts, when the same are not required by the sheriffs, and the officers of such Courts shall be bound to attend the sittings of the Crofters Commission, and perform similar duties to those which they are required to perform on the occasion of sittings of the Sheriff Court, with right to exact the same fees as are exigible by them for service at the sittings of the Sheriff Court.

27. There shall be kept in the sheriff-clerk's office of the county to which, or to any part of which this Act applies, a book to be called the 'Crofters Holdings Book.' In this book the sheriff-clerk shall record every order of the Crofters Commission with the application on which it proceeds, and any other proceeding in the case which the Commissioners may think necessary to be recorded. It shall be the duty of the Crofters Commission to send such orders and applications to the sheriff-clerk to be recorded.

Record of proceedings; transmission of applications by sheriff-clerk; sheriff-clerk's remuneration.

In any county to which this Act applies which is divided into districts for judicial purposes, the 'Crofters Holdings Book,' applicable to the holdings within any district in which there is a resident sheriff-clerk or sheriff-clerk-depute having an office, shall be kept by the sheriff-clerk or sheriff-clerk-depute resident within the district.

Every application shall be addressed to the Crofters Commission at the sheriff-clerk's office, and it shall be the duty of the sheriff-clerk to transmit the same to the Crofters Commission, according to such regulations as the Secretary for Scotland may prescribe.

The sheriff-clerks shall receive such remuneration as the Treasury may sanction out of moneys to be provided by Parliament.

28. Any order of the Crofters Commission, or two of their number acting as hereinbefore provided, may be presented to the sheriff, and the sheriff, if satisfied that the order has been made in conformity with the provisions of this Act, and has been duly recorded, may pronounce decree in conformity with such order on which execution and diligence shall proceed.

Execution of orders made by Commission.

29. The Crofters Commission may, subject to the approval of the Secretary for Scotland, frame and issue such printed forms of application and other forms of procedure as they shall think proper.

Forms of application procedure.

It shall be in the power of the Crofters Commission to make rules with reference to proceedings before the Commission, and also with the approval of the Treasury, to fix a scale of costs and fees to be charged in carrying the Act into execution, and the taxation of such costs and fees, and the persons by whom, and the manner in which, such costs and fees are to be paid.

30. Where, in any proceeding under this Act, the Crofters Commission is empowered to pronounce an order, the landlord and the crofter may agree to accept the decision of a sole arbiter mutually chosen instead of the decision of the Crofters Commission, and in that case any order pronounced by such sole arbiter shall, when recorded in the 'Crofters Holdings Book' along with the agreement to accept his decision, be as effectual to all intents and purposes as an order of the Crofters Commission; and all regulations applicable to the Crofters Commission, and to the orders pronounced by them, shall apply to any sole arbiter and the orders pronounced by him.

Sole arbiter may be chosen.

31. Nothing in this Act shall affect the provisions of the Agricultural Holdings (Scotland) Act, 1883, provided that:

Saving of 46 & 47 Vict. c. 62.

Where any improvements are valued under the said Act with a view to compensation to be paid to a crofter, such valuation shall be made, unless the landlord and the crofter otherwise agree, by the Crofters Commission, according to the procedure prescribed by this Act.

Loans for the purchase and equipment of fishing boats.

32. For the purpose of enabling the Fishery Board for Scotland, established under the Fishery Board (Scotland) Act, 1882, to make advances by way of loan to persons engaged in the prosecution of the fishing industry, whether crofters or others, incrofting parishes in all or any of the counties to which this Act applies, and abutting upon the sea, it shall be lawful for the Treasury to advance to the Fishery Board such sums as may from time to time be placed at their disposal by Parliament for the purpose.

The purposes to which the sums advanced as aforesaid shall be applied by way of loan shall be deemed to include the building, purchase, or repair of vessels, boats, and gear for fishing purposes, and any other purpose of the like nature, for the benefit or encouragement of the fishing industry within the localities above specified, which may be sanctioned by the Fishery Board, with consent of the Secretary for Scotland.

The loans in making which the said sums shall be applied, shall be made by the Fishery Board upon such terms as to repayment, security, rate, and payment of interest, and otherwise, as the Secretary for Scotland, with the consent of the Treasury, shall determine.

27 & 28 Vict.
c. 53.
44 & 45 Vict.
c. 33.

All moneys due in respect of loans made under this Act may be recovered by the Fishery Board summarily, in manner provided by the Summary Jurisdiction Acts, and the Secretary of the Board for the time being shall have power to sue for and recover such moneys in name of the Board.

A certificate, purporting to be signed by the chairman and secretary of the Fishery Board, stating the amount due from any person in respect of any loan made to him under this Act, together with the interest thereon, shall, until the contrary is proved, be evidence of the amount due and of the liability of the person therein named to pay the same.

If at any time while any part of a loan under this Act remains unpaid, the Fishery Board are satisfied that the borrower is not carrying into effect the undertaking for which the loan was made, they may forthwith sue for and recover summarily the loan and all moneys due by him in respect thereof.

All moneys recovered by the Fishery Board in repayment of such loans, and interest thereon, shall be paid by the Fishery Board to the account of Her Majesty's Exchequer, as the Treasury may from time to time direct.

45 & 46 Vict.
c. 78.
48 & 49 Vict.
c. 61.

Saving in case of holdings in possession of servants.

The Fishery Board shall, in the annual report to be made by them to the Secretary for Scotland, in terms of the Fishery Board (Scotland) Act, 1882, and the Secretary for Scotland Act, 1885, give an account of their intromissions under this Act during the preceding year.

33. Nothing in this Act shall apply to any holding or building let to a person during his continuance in any office, appointment, or employment of the landlord, or of any tenant of the landlord, nor to any holding or building let at a nominal rent, or without rent, as a pension for former service, or on account of old age or poverty, nor to any holding or building let to a person during his tenure of any office such as that of minister of religion or schoolmaster, nor to any innkeeper or tradesman placed in the district by the landlord for the benefit of the neighbourhood.

34. In this Act ‘crofter’ means any person who at the passing of this Act is tenant of a holding from year to year, who resides on his holding, the annual rent of which does not exceed thirty pounds in money, and which is situated in a crofting parish, and the successors of such person in the holding, being his heirs or legatees. Definitions.

‘Crofting parish’ means a parish in which there are at the commencement of this Act, or have been within eighty years prior thereto, holdings consisting of arable land held with a right of pasturage in common with others, and in which there still are tenants of holdings from year to year, who reside on their holdings, the annual rent of which respectively does not exceed thirty pounds in money, at the commencement of this Act.

‘Cottar’ means the occupier of a dwelling-house situate in a crofting parish with or without land who pays no rent to the landlord, as also the tenant from year to year of a dwelling-house situated in a crofting parish who resides therein, and who pays to the landlord therefor an annual rent not exceeding six pounds in money, whether with or without garden ground, but without arable or pasture land.

‘Permanent improvements’ means the improvements specified in the schedule to this Act.

‘Holding’ means any piece of land held by a crofter consisting of arable or pasture land, or of land partly arable and partly pasture and which has been occupied and used as arable or pasture land (whether such pasture land is held by the crofter alone, or in common with others) immediately preceding the passing of this Act, including the site of his dwelling-house and any offices or other conveniences connected therewith, but does not include garden ground only, appurtenant to a house.

‘Treasury’ means the Commissioners of Her Majesty’s Treasury.

Other expressions have the same meanings as in the Agricultural Holdings (Scotland) Act, 1883. 46 & 47 Vict.
c. 62.

35. This Act may be cited as the ‘Crofters Holdings (Scotland) Act, 1886.’ Short title.

SCHEDULE.

Permanent Improvements.

1. Dwelling-house.
2. Farm offices.
3. Subsoil or other drains.
4. Walls and fences.
5. Deep trenching.
6. Clearing the ground.
7. Planting trees.
8. Making piers or landing stages.
9. Roads practicable for carriages from the holding or holdings to the public road or the sea-shore.
10. All other improvements which, in the judgment of the Crofters Commission, shall add to the value of the holding to an incoming tenant.

RULES AND REGULATIONS ISSUED BY THE CROFTERS COMMISSION
UNDER THE ABOVE ACT.

At Edinburgh, the 21st day of September, 1886.

It is this day ordered that the following general rules and regulations shall henceforth, until further order, take effect and be in force under the Crofters Commission in relation to all proceedings before the Commission, taken under the Crofters Holdings (Scotland) Act, 1886.

1. When in any rule the words 'the Act' are used, they shall mean the Crofters Holdings (Scotland) Act, 1886, unless some other Act is expressly mentioned.

2. The word 'order' shall include decree, award, or ruling of the Commission in any proceeding under the Act.

3. The expression 'principal clerk' shall include the person who for the time being shall discharge the duties of the principal clerkship of the Crofters Commission.

4. The expression 'assistant clerk' shall include the person who for the time being shall discharge the duties of the assistant clerkship of the Crofters Commission.

5. The expression 'sheriff-clerk' in these rules and in the table of fees appended hereto shall include sheriff-clerk-depute.

6. The expression 'crofting parish' shall include all parishes in any of the counties specified in section 19 of the Act to which the Commission have determined that the Act shall apply, and which determination has been duly confirmed by the Secretary for Scotland.

7. In the computation of time for the purposes of the Act, and of these rules, the word 'month' shall mean calendar month, and when the time limited for any proceeding before the Commission expires on a Sunday or Fast Day it shall be extended to the next lawful day.

8. The central office of the Crofters Commission in Edinburgh shall be open throughout the year on every lawful day from 10 o'clock A.M. till 4 o'clock P.M., except on Saturdays, when it shall close at 1 o'clock P.M.

9. The sittings of the Commission will be held for the purpose of hearing all competent applications which may be made to the Commission, and of rehearing before all the Commissioners applications or proceedings delegated to two of their number under section 23 of the Act. Of consent of parties, or on special grounds, the Commissioners may direct a rehearing of any application or proceeding to be taken at any place they may fix. The Commissioners hereby reserve to themselves full power to vary or adjourn any sittings announced, and to adjourn or postpone any proceedings before them.

10. The procedure under the Act shall be by the forms appended hereto, or as nearly in accordance therewith as possible, and by such other forms as the Commissioners may hereafter issue. All applications shall be on paper of medium folio size.

11. All applications to the Commission must be signed by the applicants or their law-agent or agents, and in any case where an applicant who is not represented by a law-agent cannot write, he shall adhibit a **X**, and have the same duly witnessed by one witness of not less than twenty-one years of age. In the case of a landlord, an application may be signed by his factor. In the event of there being more than one respondent, or party interested, the applicant, or applicants, shall send

as many forms or copies, duly filled up, signed, and stamped, as there are respondents or parties interested.

12. When an applicant cannot write, the witness to his X must also certify in writing on the application, that the said application, statement of facts (if any), and relative schedule or schedules have been read over and explained to the applicant in his presence.

13. All applications under cover shall have the nature of the application written legibly on the cover, as for example, 'Application to fix Fair Rent,' or as the case may be.

14. Whenever any competent application has been received by the principal clerk from a sheriff-clerk, the matter shall be deemed to be in Court as an application to be decided, and shall not be withdrawn save by leave of the Commission, given after such intimation as the Commissioners may direct.

15. The Commission may at all times amend, or allow the amendment of applications, or intimations, or other proceedings, and may if they think fit extend any time which may be allowed for taking any steps in any proceeding under the Act.

16. Parties applying to the Commission or appearing in answer to any application intimated to them may attend the Commission by themselves or by a law-agent, with or without counsel, or by a friend.

17. In every case in which a party is represented by a law-agent intimation to such law-agent at his address shall be a sufficient mode of making intimation of any steps in any proceedings to such party, and intimations may either be made by being left at such address, or transmitted thereto by registered post letter.

18. When the person to whom intimation of any application or other proceeding to be made is the landlord, intimation to the factor or agent to whom the crofter's rent has been usually paid, shall be deemed sufficient intimation to the landlord.

19. Any intimation by letter or other written or printed communication shall be deemed to have been duly addressed to the party intended to be communicated with, when it has been directed to him at the address given in the application to which such letter or written or printed communication may refer.

20. After an order and relative application have been recorded by the sheriff-clerk of the district in the Crofters Holdings Book he shall retain the same as the proper custodier thereof, but exhibit it when called upon by any party to the application. In the event of any such party desiring that such order be presented to the sheriff, in terms of section 28 of the Act, the same shall be made forthcoming by the sheriff-clerk.

21. The sheriff-clerk shall allow any party to an application to make a copy thereof, and of the relative order or orders from the Crofters Holdings Book, during office hours, free of charge.

22. Every application to the Commission under the Act, and every copy for a respondent, must have upon it a postage or Inland Revenue adhesive stamp of the amount provided by Part I. of the Table of Fees annexed hereto. All adhesive stamps must be placed on the outer page of each form, and copy form, at the place indicated thereon.

23. Crofters in townships contiguous or near to each other, may unite in the same application for fair rent, provided all the applicants have right to the same common pasture. In the event of the number

of crofters thus combining in one application being so large as to occupy more than the available space on Form 2, then a second copy will be added, and the matter inserted on page one will be continued on page nine, and the matter inserted on page two will be continued on page ten, and so forth.

24. In the event of a landlord applying to fix fair rents for a number of crofters so large as to occupy more than the available space in Form 4, then a second copy will be added, and the matter inserted on pages two and three will be continued on pages ten and eleven, and so forth.

25. A landlord or his factor, on receiving information of an application for enlargement of holdings, shall communicate to the principal clerk of the Commission the names and addresses of all persons in the occupation of, or otherwise interested in, the land proposed to be added to the holdings of the applicants, including heritable creditors having securities over the same.

26. Where the same or a similar question is raised in two or more cases before the Commission, or where it shall for any reason seem expedient to the Commission, then the Commission may by order direct that such cases shall be heard together, or that process in any one or more of such cases may be sisted, and the Commission may exercise the power of conjoining proceedings in any two or more cases whenever they think fit.

27. Any person aggrieved by any order pronounced under section 23 of the Act, by two Commissioners, to whom any matter has been delegated by the Crofters Commission, may, by himself or his agent, within fourteen days after the date of such person having received from the sheriff-clerk intimation of such order, intimate an appeal for review of such order by the whole three Commissioners, either by registered post letter to the sheriff-clerk, or by writing below such order the date, and the words, 'I appeal against the above order,' together with his signature.

28. The Commissioners shall, as soon thereafter as may be, fix by an order a time and place for hearing such appeal and reviewing the order of the delegated Commissioners, and the principal clerk shall at once intimate such order to all the parties to the proceedings under appeal.

29. The Commission shall have power, as authorised by section 24 of the Act, to make any order as to expenses which they think fit in any proceeding before them.

30. Landlords or crofters who desire to make application to the Crofters Commission, will be supplied free of charge with forms of application and relative copy forms on applying for them to the sheriff-clerk, or to the principal clerk of the Commission.

[Here follow the forms, with relative schedules, issued by the Commissioners and applicable to the following cases, viz.:—

Form 1. Application by a crofter to fix a fair rent.

Form 2. Application by crofters to fix fair rents.

Form 3. Application by a landlord to fix a fair rent.

Form 4. Application by a landlord to fix fair rents.

Forms 5, 6, and 7. Applications by crofters for enlargement of holdings.

5. By taking land from a deer forest.

6. By taking land from a farm occupied by the proprietor.

7. By taking land from a farm let to a tenant.

Form 8. Application by a crofter to sist proceedings for his removal.

To the applications (1-4) for the fixing of a fair rent, are appended schedules A and B, which have to be accurately filled up. Schedule A ascertains the names and addresses of the landlord and crofters concerned, and the names of the estate and croft or township. Schedule B sets out the area of the arable land, outrun and pasturage, to which the application refers, the stock which the crofter is entitled to keep, his rent, other payments and services; the permanent or unexhausted improvements executed or paid for by the crofter or his predecessors in the same family, and the permanent or unexhausted improvements executed, paid for, or contributed to, by the landlord or his predecessors in title. The schedule appended to Forms 5, 6, and 7 is substantially the same as this Schedule B, omitting the entries of arrears and improvements. And part of the Forms 5-8 consists of skeleton statements of fact.]

TABLE OF FEES APPROVED BY THE TREASURY.

PART I.—EXCHEQUER FEES.

Note.—The Exchequer fees are payable to the sheriff-clerk. Every principal and copy Form lodged with him must bear Postage or Inland Revenue adhesive stamps of the values specified in this Table :—

A. Applications to fix Fair Rent.

Form 1.

Principal, ...	£0 1 0
Copy for landlord, ...	0 0 6

Form 2.

Principal (each applicant), ...	0 1 0
Copy for landlord, ...	0 1 0

Form 3.

Principal, ...	0 1 0
Copy for crofter, ...	0 0 6

Form 4.

Principal, ...	0 1 0
Copy (each crofter therein named), ...	0 0 6

B. Applications to enlarge Holdings.

Forms 5, 6, and 7.

Principal (each applicant), ...	£0 1 0
Copy for landlord (each applicant), ...	0 0 6
Copy for agricultural or pastoral tenant, if any, (each applicant), ...	0 0 6
Copy for shooting tenant, if any (each applicant), ...	0 0 6
Copy for any other respondent named in the application (each applicant), ...	0 0 6
Copy for any other party not named in the application, to whom the Commissioners may, under section 21, direct intimation to be made, on appearing before the Commission (each applicant), ...	0 0 6

C. *Appeals under Section 23.*

Intimation of appeal (each appellant), ...	£0 2 6
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D. *Miscellaneous.*

All other applications—

Principal (each applicant), ...	£0 1 0
Copy (each respondent), ...	0 0 6

PART II.—LAW-AGENTS' FEES.

1. In all proceedings under the Act before the Commission, the fees stated in the following Table shall be the standard fees and emoluments chargeable by, and payable to, law-agents for all professional services from the application to the final order of the Commission; but the Commission at the same time reserve to themselves full power to deal in such manner with expenses in each case as to them shall seem just. All accounts of expenses may be remitted by the Commissioners for taxation by the principal clerk of the Commission.

2. The fees specified shall include all outlay except postages, telegrams, Exchequer fees, and citation and other expenses of witnesses (if any).

3. When two or more applications involving similar questions, and arising with respect to holdings held under the same landlord, are heard at the same place and sittings, and have been conjoined by the Commissioners, they shall have power to award to the law-agent conducting the same a lump sum for his expenses in respect of all the applications in which he so appears, and, if necessary, to settle the proportions in which the same shall be borne and received respectively.

A. *Applications to fix Fair Rents.*

Forms 1 and 3.

Where the present rent does not exceed £5, ...	£0 10 0
Where it exceeds £5, but does not exceed £10, ...	1 0 0
Where it exceeds £10, but does not exceed £20, ...	1 10 0
Where it exceeds £20, ...	2 0 0

Forms 2 and 4.

The fees under these Forms payable to or by each crofter will be in the same proportion to the rent as under Forms 1 and 3; but when the number of applicants (Form 2) or of respondents (Form 4) is above 4 and not exceeding 10, there shall be a deduction at the rate of 10 per cent., and where the number exceeds 10, a deduction at the rate of 20 per cent.

B. *Applications to enlarge Holdings.*

Forms 5, 6, and 7.

Where the present average rents do not exceed £5 (for each crofter making the application), ...	£0 10 0
Where the present average rents exceed £5 (for each crofter making the application), ...	1 0 0

Note.—Where there are more respondents than one in any application under Forms 5, 6, and 7, the Commissioners may make such orders for additional expenses as to them shall seem just, against such respondents jointly and severally, or against the applicants, as the case may be.

C. Citation of Witnesses.

The fees payable under the Act 45 & 46 Vict. c. 77, second schedule, for citing witnesses to Small-Debt and Debts Recovery Courts, otherwise than by registered letter.

No. XIII.¹

CONDITIONS OF LEASE OF THE ARABLE AND GRAZING FARMS AND POSSESSIONS UPON THE ESTATE OF A.

THE farms are let according to the marches pointed out, without reference to measurement or advertisement, for the period, and with entry as stipulated in the respective offers. The tenants shall be bound to reside constantly on their farms and possessions, unless they shall have the written consent of the landlord to do otherwise, and to have them at all times fully and completely stocked. All assignees, whether legal, voluntary, or conventional, and possessors for behoof of creditors, and subtenants, except where they shall have the special consent of the proprietor in writing, are expressly excluded and debarred; also heirs-portioners are expressly excluded and debarred, the eldest daughter succeeding without division: but power is given to tenants having children to appoint any one of them, whether son or daughter, to succeed them in their leases, but such appointments must be made in writing, and approved of by the proprietor, before the decease of the tenant, declaring that this arrangement shall supersede the provisions of the Agricultural Holdings (Scotland) Act, 1883, as to the tenant's right to bequeath his lease.

Assignees and heirs-portioners excluded.

The proprietor expressly reserves all woods and plantations of every description, with the grass therein, and none such are included in any let; he also reserves all dwelling-houses and cottages, with the gardens or yards attached, if any, on the farms, with the exception of the dwelling-house of the tenant, and the cottages of the ordinary farm-servants; and the occupants of such reserved dwelling-houses and cottages are to hold the same directly from the proprietor. He also reserves all mines, metals, minerals, lime, slate, marl, fossils, and quarries of every description, with full power to search for, work, win, manufacture, and carry away the same, and to erect buildings, workmen's houses, and furnaces, to sink pits, and to make connection with other lands, and generally to do everything necessary in connection with said minerals, and others, and the working thereof; the tenants being entitled to compensation for any surface damage sustained

Reservations—viz., woods and houses.

Minerals, &c.

¹ In order to keep down the bulk of this volume, it has been thought sufficient to give in the succeeding pages only such forms as are necessary to supplement the useful collection contained in the Juridical Styles (i. 565 *seq.*) and therefore, easily accessible. The Appendix to Hunter on Landlord and Tenant also contains a full set of forms. The *first* form (No. XIII.), sets out conditions of lease of a mixed arable and grazing farm, and contains provisions for 'substituted compensation' in view of the Agricultural Holdings Act. The *second* form (No. XIV.), is a lease drawn in contemplation of that Act, and without any attempt to oust its operation. The *third* form (No. XV.), deals elaborately with the provisions of the Act. A form of lease of a shop—not to be found in the Style Book—is added (No. XVI.).

through such operations, as the same shall be fixed by arbitration, in manner hereinafter mentioned. The proprietor also reserves power to plant and enclose any portion of the lands let, at any time, the tenant being allowed an annual abatement from his rent for any ground thus planted and enclosed; but where such plantations shall be merely as sheep stalls, or in clumps or strips for shelter, no allowance or deduction shall be made to the tenant. The proprietor also reserves power to excamb with neighbouring proprietors, or to alter and straighten the marches of the different farms and possessions, and to settle all disputed marches, or to take ground from any farm and add it to any adjoining farm, the rents being increased or diminished accordingly, as the case may be, as may be settled by arbitration. The proprietor also reserves to himself the power of regulating and conducting away springs and streams of water for meal-mills or other machinery, or for watering lands, or for other purposes. He also reserves power to make drains, and open cuts and ditches through any part of the lands, either for the drainage of the respective possessions, or of the lands contiguous, and shall not be liable to pay any surface damages therefor, nor shall the tenant be entitled to demand any abatement of rent in consequence thereof; he also reserves to himself the power of draining, redraining, and thorough draining the lands of any farm or grazing, at any time he may see proper, and carrying out the drainage in such a manner as he may see to be right, without being liable for any surface damages in respect thereof. He also reserves all roads of every description on the lands let, and full power to alter or widen the same, or to make new roads in any direction, and to take all materials for that purpose, without giving any deduction from the rent, or allowance of any kind in respect thereof, unless such roads, or the operations connected therewith, shall happen to injure or come upon corn or grass fields or enclosed ground, in which case the tenant shall be allowed surface damages as the same shall be ascertained by arbitration; but where a road shall be made for the special use of a tenant, in terms of his lease or otherwise, no surface damages shall be allowed, and in this case the tenant shall be bound to perform all carriages necessary in connection with the work, without being entitled to compensation. And in the event of a railway or tramway being formed through any part of the estate of A, the proprietor specially reserves the ground upon which such railway or tramway shall be formed; and it is specially understood and agreed that such ground shall be excluded from the lease of any lands of which the same, or any part thereof, may form part; and the tenant of such surrounding or adjoining lands shall be bound, whenever required, to cede possession of such ground, without any claim for compensation or deduction from his rent in respect thereof, whether the said ground be arable, pasture, grazing, or of whatever other nature. And subject to the provisions of the Ground Game Act, 1880, the proprietor reserves all salmon and other fishings, and all game, deer, roe-deer, hares, rabbits, and wild-fowl on his estates; and also the right of hunting, shooting, coursing, and sporting generally, with men, horses, and dogs, over the lands not under grain crop, and of fishing in the waters, by nets, boats, or otherwise, by himself, his servants, tenants, or others having his permission, and that without liability for damages to the tenants, in respect of any injury they may sustain in the occupation of the lands. And it is hereby agreed, with reference to the terms

Power to plant and to alter marches.

To regulate water and make drains.

Roads.

Railway or tramway.

Fishings and game.

of the Game Laws Amendment (Scotland) Act, 1877, that the amount of annual damage done to the tenant's crops by game other than ground game (for which no compensation shall be due) shall be such sum as may be specified in the respective agreements or missives, or failing such specification shall be the sum of £15 for each farm, and any claim of damages beyond such amount arising under the said Act shall be referred to arbitration. The tenants shall also, so far as in their power, protect the game on their respective farms, and prevent all poachers and others from trespassing thereon, and shall be bound to give timely warning to the proprietor of any trespass. The proprietor further reserves the Timber. whole wood and trees, including broom and underwood of every description, whether natural or planted, growing or to grow on any part of the lands let, with full power to prune, dress, cut, sell, and carry away the timber at pleasure, and by whatever means he may think proper, and with full liberty of access through the lands for this purpose, the tenant to be indemnified for any damage his corn or young grass lands or crops may sustain thereby; and with power also to plant additional trees round the yards and along subdivision fences, or on any part of the lands, to alter and make roads and loanings, and to quarry and carry materials for repairing public and private roads, all without compensation. Right to feu or let on long lease any part of the lands is also Right to feu. reserved, the tenants in this case being entitled to compensation for any ground taken from them, as the same shall be settled by arbitration.

The rents and services specified in the offers, tacks, or minutes of lease, entered into with reference hereto, shall be paid and performed by the respective tenants, their heirs, executors, and successors, to the proprietor, his heirs, executors, and successors or assignees, in such proportions and at such terms as are stated in said offers, tacks, or minutes of lease,—the rents being payable at such place or places as the factor on the estates shall appoint, with one-fifth part more thereof of liquidate penalty in case of failure, and interest on each term's payment, at the rate of five pounds per centum per annum, from the time the same falls due till paid. The rent of the last year shall be payable before his removal, or he shall be bound to find security therefor before that event, to the satisfaction of the landlord or his factor. The tenants Burdens. shall also pay road-money and other public and parochial burdens now imposed, or which may hereafter be imposed on their possessions in respect of the tenancy thereof. They shall also be bound, when required, to give the free use of horses and carts yearly, in the proportion of five days' work of one horse to every £100 sterling of rent, for the benefit of the proprietor, for such purposes and at such times as he or his factor may deem necessary, the tenant to receive one week's notice whenever such service shall be required, and the same not to extend beyond the limits of the property.

The tenants at their entry shall accept all the buildings on the Buildings. respective farms and possessions in the condition that they may then happen to be, and shall relieve the proprietor of any allowances or meliorations which the outgoing tenants may be entitled to receive at their removal. The buildings shall be given over to the tenants on dead inventory; and they shall be bound to keep the said buildings on their respective farms and possessions at all times in thorough repair, and uphold the proprietor's inventory, or pay for deterioration as the same shall be ascertained by arbitration, the ordinary decay of material

Fences.

Hedges and
ditches.Permanent
improve-
ments.Tenants to
perform
carriages.

to be taken into account; and if at any time during the lease the tenants shall fail in keeping said buildings in repair as aforesaid, after being required by the proprietor or his factor to do so, the proprietor shall be entitled to repair the same at the tenant's expense, and without their consent. The tenants at their entry shall be obliged to accept of the hedges, dykes, palings, wire-fences, gates, ditches, and all other fences on their respective possessions, in the condition they may then happen to be, and shall repair these from time to time as may be necessary to keep them in proper condition; and they shall prune and clean the hedges once every year, and at the proper season, and shall scour and clean the ditches, and open cuts at least once in every period of three years, or whenever the proprietor or his factor shall deem such work to be necessary. Plantation fences shall be kept up at the expense of the proprietor, the tenant being bound immediately to report all injuries to the fences, and being liable for damages if he allow his beasts to trespass in the woods or plantations. All march fences shall be kept up at the mutual expense of the conterminous tenants; and the tenants are expressly prohibited from cutting any underwood or bushes for the purpose of erecting or repairing fences, without the consent of the proprietor or his factor, in writing. The proprietor reserves power to make a periodical inspection of all the buildings and fences on the respective farms and possessions.

In the event of any of the tenants desiring to effect any permanent improvements, of the nature authorised by the Acts of any of the Lands Improvement Companies, or by the Enclosure Commissioners, they shall be entitled to do so, with the sanction of the proprietor or his factor, on observing the procedure requisite for obtaining money from such Improvement Companies; and in that case, or in the event of the proprietor himself making any such permanent improvements, or expending money in building or repairing houses, or in draining or fencing any part of the farms or possessions, or otherwise, the tenants shall be bound to pay interest at the rate of five per centum per annum, or in the option of the proprietor an annual rent-charge at the rate allowed under section four of the said Agricultural Holdings Act on all such outlay on improvements as before mentioned, which interest or rent-charge shall be payable along with their respective rents, commencing payment thereof at the first payment of rent after the outlay has been incurred. The tenants shall be bound to perform all carriages and cartages connected with any buildings, draining, or other improvements executed or sanctioned by the proprietor as aforesaid on their respective farms or possessions, and shall have no claim, nor be allowed any compensation in respect thereof, on any pretence whatever; and the amount expended on building or repairing houses shall be added to the existing dead inventory, together with the value of any timber taken from the woods or plantations for that purpose, and the tenant shall be bound to keep up the whole in the same manner as the original dead inventory. Tenants shall have no claim for meliorations or improvements unless the same shall be stipulated for and specified in their respective missives or offers, and agreed to by the proprietor or his factor in such missives, or in some separate writing under the hand of the proprietor or his factor, and then only in the event of the particular erections or improvements being specially authorised and approved of in writing by the landlord or his factor,

and made under his inspection. The claims of tenants for such meliorations or improvements, and the amount due to each during the lease, or at the expiry thereof, shall be ascertained by arbitration; but the arbiters, in estimating the value of the work, shall exclude carriages of every description, and the proprietor's inventory shall be deducted. All houses so valued must consist of good mason-work, and be built of stone and lime, snecked and pinned with lime, with a set-on roof, and at the time be in a good state of repair. The tenants are specially prohibited from building any additional houses or dykes, without the written consent of the proprietor, and in the event of such being done contrary to his wishes, he reserves power to have the same removed at pleasure at the tenant's expense. The tenants shall be bound to keep in repair without charge the roads leading to their farms or possessions from the public highways, or they shall be assessed by the proprietor to such an amount as he may consider necessary for that purpose; and the tenants shall prevent all persons making new roads or footpaths through the lands, or trespassing thereon or in the plantations, to the utmost of their power.

No claim for meliorations unless stipulated for.

Farm roads to be kept in repair by tenants.

The tenants shall be bound to cultivate, manure, and improve the arable lands of their respective farms and possessions according to the most modern and approved system of husbandry; and, in particular, they shall be bound to manage the same under a *sixth* shift rotation. Such rotation shall consist of—1st year, oats after lea; 2nd year, green crop, potatoes or turnips, properly and sufficiently manured, cleaned, and dressed; 3rd year, barley, oats, or wheat, sown down with a proper proportion of grass seeds; 4th year, hay, to be cut only once, and afterwards pasture; and 5th and 6th years, pasture. And should any tenant depart from the rotation of cropping fixed as aforesaid, he shall subject himself in payment of an additional rent of £5 sterling per acre for whatever quantity of land he may crop differently, which additional rent shall be pactional, not penal, and shall become due and payable with the first moiety of the rent of the crop wherein such contravention shall take place, and shall continue to be so paid so long as said contravention shall continue, but without prejudice to the landlord's right to enforce the cultivation of the farm in the manner above prescribed. The whole straw and green crop produced on the respective farms shall be consumed thereon, and the manure made thereof, and on the farm, shall be applied annually to the division under green crop. The tenants shall be bound at entry to accept of the manure for that division of the fallow-break intended for green crop, and of the whole crop growing on the respective farms, including hay and pasture-grass, and pay for the same at the valuation of arbiters in manner before mentioned, and at their removal they shall be bound to give, and their successors shall be entitled to take, the fallow-break manure and whole crop at valuation in manner aforesaid; and the tenants shall be bound to allow the proprietor or incoming tenant to sow grass-seeds at the proper season, along with the last crop, in the division of the respective farms properly adapted for the same, and to harrow in and roll the same in a proper manner, all without any compensation. The tenants shall be bound to have the fallow-break ploughed by the 1st January in the year of their removal, for the benefit of the proprietor or incoming tenant, for which they shall be paid as the value of such labour shall be fixed by arbiters. The tenants shall cut down, at least twice every year, all ragweed, docks,

Mode of cultivation.

Sixth shift to be observed.

thistles, and all other weeds on their lea or pasture, as well as on the sides of roads, dykes, or ditches on their respective possessions,—once before they come into flower, and again before the 1st of September; and in case of the tenants' failure, the proprietor reserves the right of having this done at the tenants' expense. And with respect to manures and feeding stuffs not produced at the farms, but purchased by the tenants and applied thereto, or consumed thereon, the tenants shall, on leaving the farms at the determination of their tenancies, respectively receive compensation for the same from the incoming tenants or proprietor in terms of the schedule annexed and signed as relative hereto, such compensation, failing agreement, to be ascertained by arbitration as after mentioned, and the compensation specified in the said schedule (which is agreed to by the tenants as fair and reasonable compensation under the foresaid Agricultural Holdings Act), shall be accepted by the tenants as full compensation in lieu and place of the compensation that would, but for these presents, be claimable by them in respect of the improvements specified in Part III. of the schedule annexed to the said Act, but without prejudice to the provisions of sections 6 and 7 of the said Act, which shall be specially applicable hereto, and to any claim for compensation following upon this provision.

Sheep-stock on
grazing.

The tenants shall be bound at entry, if required by the proprietor, to take over at valuation from the outgoing tenant the sheep stock on the respective grazing farms, or so much thereof as shall correspond to the extent of the grazing land on any possession; and it shall be in the option of the proprietor or next incoming tenant to take over such stock, and the tenant shall be bound at removal to give over the same at valuation, provided notice in writing is given to him, at least six months previous to the date of his removal from the grazing, that it is the intention of the proprietor or next incoming tenant to take such stock as aforesaid at valuation. No tenant shall be allowed to change the stock of sheep on the farm without the express consent of the proprietor or his factor in writing; nor to dispose of any of the usual breeding stock; and in the event of any tenant taking two or more farms or grazings, he shall be bound to keep and have separate and distinct marks and brands on the stock of each farm or grazing.

Woods.
Heather-burn-
ing.

The tenants are also bound to use every means in their power to protect the whole woods and plantations on their respective possessions, and shall be answerable for any damage done to the same, in such cases where the proprietor considers that the tenants should have used more precaution. The tenants are bound not to burn heather on any part of the lands let to them, without the special written consent of the proprietor or his factor, under the penalty of forfeiting their leases, or, in the proprietor's option, of paying a penalty of £5 for every acre burnt, or such other penalty as the proprietor may impose, in addition to any damage the proprietor may sustain by such burning; and all muirburning allowed shall be done at the sight of the proprietor's gamekeeper, or other person authorised for that purpose.

Peats and
mosses.

The tenants are to have liberty of casting, winning, and leading home peats for the use of their families, and servants residing on their farms, but for no other purpose, from such moss or mosses, or parts of the same as the proprietor shall set apart to them yearly for that purpose, but no claim shall lie against the proprietor in the event of the mosses becoming

exhausted. The proprietor reserves the power of making new roads to the mosses, and of keeping them, as well as the old ones, in proper repair, and of assessing the tenants frequenting such roads in the expense of making or repairing the same.

The proprietor will insure the buildings on the respective possessions in some reputable office for such sums as he or his factor may consider necessary. The policies to be taken in the name of the proprietor, and the premiums to be paid by the tenants, together with the rents, &c. The proprietor shall, in case of loss by fire, have power to uplift the sums insured, and to apply the same in rebuilding or repairing the buildings destroyed; and the tenants are further bound to insure their crops and stock in the same way, if required by the proprietor at any time to do so; and the money received by the proprietor, in the case of accident by fire to such crops and stock, shall be applied in extinction of the rents that may happen to be due or current at the time, and the balance, if any, shall be paid to the tenant.

Insurance of
buildings and
crops.

The situation and arrangement of farm-steading, as well as of all other houses and of the fences, shall in all respects be subject to the approval and control of the proprietor; and the greatest cleanliness and order and regularity shall be observed by each tenant about his premises. The tenants shall not at any time admit cottars or other residents or subtenants into houses on their possessions, nor shall they remove cottars who have once been admitted, without having in both cases the express authority of the proprietor or his factor, in writing, declaring that it shall always be in the power of the proprietor to remove cottars, and dispose of cottages and gardens, other than those occupied by the tenant, his family, and ordinary servants, without the consent of the tenants, or being liable in any claim on the tenant's part; and no tenant shall be entitled, without the express permission of the proprietor or his factor, in writing, to let for lodgings the whole or any part of any dwelling-house or cottage on his possession.

Farm-
steadings.

Cottars.

It is hereby specially provided and declared, that if a tenant shall at any time become insolvent, or be made legally bankrupt, or shall execute any trust-conveyance of his property or effects for behoof of creditors, or if his estates be sequestered under any statute in force at the time, or if a poinding of his effects shall take place, or if the tenant shall fail in the performance of all or any of the services, obligations, prestations, conditions, and regulations, or shall transgress any of the prohibitions imposed hereby, or by his offer with reference hereto, then, and in all or any of these cases, the lease shall, in the option of the proprietor, be forfeited, and the proprietor shall be entitled to remove such tenant from his farm or possession at the first term of Whitsunday after such event shall have happened, in the same manner as if the lease then expired: It being hereby declared that a decret of removal obtained from the sheriff of the county shall in every respect be held to be equivalent to a decret of declarator, and it shall not be competent to bring the matter under review of the Court of Session, by appeal, suspension, or otherwise. And it is hereby further specially provided and declared, that if the tenant shall at any time during the currency of the lease allow the rent to fall into arrear, so as to be owing a full year's rent three months after the last half falls due, the proprietor shall be entitled to apply for and obtain a warrant of sale, and to dispose not only of the tenant's stock, implements of husbandry, and household

Conventional
irritancies.

Power to
landlord to
sell for
arrears.

furniture, but also of the crops of every description then on the farm, not only to the extent of rent and arrears then due or current, but also for a further sum adequate to cover wages due to servants, taxes, poor-rates, road-money, or other claims in which the proprietor may by law be liable as intromitter with the tenant's effects, together with all expenses of sale and other expenses connected therewith, it being understood that the usual credit will be given at such sale: and in the option of the proprietor, the lease shall cease and terminate at the first term of Whitsunday immediately after such sale without any action, or process of declarator before the Court of Session, or any other procedure, further than an application to the sheriff of the county, who is hereby empowered to pronounce decree against the tenant decerning him to remove, which judgment shall not be removeable to the Court of Session by appeal, suspension, or otherwise.

How arbiters
to be named.

And it is hereby provided and declared, with regard to all matters herein mentioned as being to be settled by arbitration, or submitted or referred to the decision of arbiters or of third parties, and with regard to any disputes or questions that may arise between the proprietor and tenants, or any of them, with reference to the import of these conditions, or the stipulations, obligations, or prohibitions herein contained, or the meaning or terms of any missives of lease, or offers having reference hereto, and generally in regard to all matters that may require to be adjusted or ascertained between the proprietor and the tenants, that every such dispute, and all such questions and matters, shall be referred to an arbiter to be agreed on by the parties, or in the event of their not agreeing upon a single arbiter, then to two arbiters, one to be named by either party, or to an oversman to be appointed by such arbiters, which they shall have power to do in case of their differing in opinion; and in case of the parties not agreeing on or naming an arbiter or arbiters, or in case of such arbiters differing in opinion and failing to appoint an oversman, then to an arbiter or oversman to be appointed by the Judge Ordinary, such arbiter or arbiters and oversman being neutral persons, skilled in the matter to be referred to them; and the decision to be pronounced by the said arbiter or arbiters or oversman shall be final and binding on both parties; and the said arbiter or arbiters or oversman shall have full power to decide all questions of expenses connected with such reference, and to decern therefor.

Removal.

Upon the expiry of the term of years specified in the offers, minutes, or leases referring hereto, the tenants and their foresaids shall be bound to flit and remove themselves, their families, servants, and others, from the houses, lands, grazings, and others, let to them respectively, without any warning or process of removal being used against them for that purpose. And it is hereby declared that, whatever the term of entry may be, the terms of removal in the last year of the lease (unless otherwise stipulated for and agreed to by the proprietor or his factor) shall be—from the garden ground and fallow-break on the 1st day of March; from the houses and natural pasture at Whitsunday; from the arable land under hay and grass on the 1st of September; and from the rest of the arable lands under crop, at the separation of the crop from the ground of each respective field.

Schedule of Compensation for Unexhausted Manures, &c., referred to in foregoing Regulations, &c.

1. *Lime applied to land.*

Eight-tenths of cost after first crop; five-tenths after second crop; three-tenths after third crop, and one-tenth after fourth crop. Exhausted fifth year.

2. *Crushed bones, bone meal or bone dust, and farmyard manure.*

Purchased by the tenant. One-half of cost after first crop; and one-fourth of cost after second crop. Exhausted third year.

3. *Dissolved bones, bone phosphates, pure guano, and police manure.*

One-fourth of cost after first crop. Exhausted second year.

4. *Other artificial manures.*

Exhausted by first crop, no compensation.

5. *Feeding stuffs.*

For linseed, cotton, and rape cakes, or other purchased substances of equal manurial value consumed on the farm by cattle and sheep during the last year of the lease, one-third of the value thereof, provided the quantity shall not exceed the average of the preceding two years.

General Regulations.

1. Vouchers in all cases to be produced, and also an analysis by a competent analytical chemist if required.

2. No allowance to be made for carting lime, manure, or feeding stuffs, or applying the lime or manure to the land.

3. No nitrate of soda, sulphate of ammonia, or other such stimulating manures to be applied to the lands in the last year of the lease.

4. In cases of arbitration the arbiters to be entitled in fixing the compensation to make such deductions as they think fit, if, in their opinion, the manurial value of the substances used has been reduced through the tenant's fault or negligence, or if through his fault or negligence the land is in such a state of cultivation as to prevent the substances having their proper beneficial effect on the soil.¹

I do hereby offer the sum of _____ as
yearly rent for _____ in the parish of _____ and
county of _____ upon the estate of A, on a lease for
_____ years, from the term of _____ eighteen hundred and
_____, in terms of the preceding printed conditions of lease.
The rent to be payable half-yearly, in equal portions. at
and _____ commencing the first payment at _____ eighteen
hundred and _____ and the next payment at _____
thereafter; and that for the first year's possession, and for crop 18 _____,
and so on thereafter. And I consent to registration hereof, and of the
foregoing printed conditions of lease, for preservation and execution. In
witness whereof, this offer, written, in so far as not printed, by
_____ and the printed conditions of lease contained on the
preceding pages, are all subscribed by _____.

¹ Other forms for substituted compensation and scales of compensation are to be found in Philip, *Agricultural Holdings Act*, pp. 44 *seq.* It is very doubtful whether any scale, however carefully prepared, should be preferred to the unimpaired discretion of arbiters under the Act.

No. XIV.

FARM LEASE DATED SUBSEQUENTLY TO THE
AGRICULTURAL HOLDINGS ACT, 1883.

IT is contracted and agreed between A (hereinafter designated 'the 'landlord') on the one part and _____ on the other part in manner following:—That is to say, the said A, in consideration of the rent or tack-duty and other prestations after written, and under the reservations, conditions, provisions, and declarations after expressed, hereby lets to the said _____ and his heirs, but always without division (the eldest heir female, when the succession would devolve by law on heirs-portioners, succeeding exclusively), and also expressly excluding assignees, whether legal or conventional, and all subtenants of every description, and creditors or managers for creditors, in any way or shape, unless with the consent of the landlord: Declaring that the said _____ or the person in right of this lease at the time, is hereinafter designated 'the tenant': All and whole _____ lying in the parish of _____ barony of _____ and county of _____, and that for the period of _____ years and crops from and after the term of Martinmas, eighteen hundred and _____ as to the lands for tillage and the term of Whitsunday immediately thereafter as to the houses and pasture grass, which terms respectively are hereby declared to be the terms of the tenant's entry to the premises under this lease, notwithstanding the date hereof; but excepting always from this lease the whole ground damaged, occupied, or taken off the farm prior to the tenant's entry under this lease: Reserving always to the landlord the whole coal, ironstone, shale, marle, clay, sand, limestone, stone, and all other mines, metals, minerals, and fossils of every description in the farm hereby let, with full power and liberty to him, by himself, or his tacksmen or servants, to do everything necessary for working, raising, quarrying, sinking, winning, smelting, burning, charring, manufacturing, storing, transporting, selling, and carrying away the same or any other article of that description found in any other lands belonging to the same or any other proprietor, and that at pleasure: Declaring that, in the event of any damage being caused to the said farm in consequence of subsidence or otherwise through the working of the said minerals, the same shall be referred to arbitration, as after provided; but it shall not in any case be competent to the arbiters to award a larger sum as compensation for damage than three times the rent of the lands injured by the said operations, such rent being calculated according to the extent of these lands as compared with the whole extent of the farm: And further declaring that any claim by the tenant against the landlord for compensation in respect of the working of the said minerals shall be rendered to the landlord in writing, and shall contain a statement of the nature of the alleged damage and the amount of compensation claimed, and the said claim shall be rendered within a reasonable time and not exceeding one year after the damage therein referred to has been occasioned, and at a time when the damage can be seen and estimated; and in the event of the tenant failing to comply with these requirements, he shall have no claim against the landlord in respect of any damage for which he shall have failed to render a claim in manner above expressed: Also,

Farm.

Years.

Reservations.

Minerals.

reserving to the landlord full power and liberty to resume and take possession of any part or parts of the lands and others hereby let, ^{Power to resume.} he may at any time desire for the purposes before mentioned or any of them, or for erecting manufacturing premises, engines, and machinery, for fitting or carrying on any manner of works, and for providing houses, yards, and other accommodation for the use of the workmen and others employed thereat, as also to take off ground for the purpose of making excambions, with other proprietors, straightening marches, making, altering, or widening roads, making canals and reservoirs, letting out on building leases or granting feus, or for making plantations, or for any purpose whatsoever for which the landlord may desire the same; and also reserving to the landlord full power to make railways and tramways of every description upon the lands hereby let, and also drains, water runs, ditches, or aqueducts and conduits for any of the above purposes or for the drainage of other farms or a district of the estate, the landlord being bound to make fences around all ground so resumed that may be so appropriated as to render a fence necessary, the value of any ground that may be added to the farm by excambions or alterations of marches being added to the rent hereinafter stipulated, and the value of any ground that may be taken off the farm or damaged by any of the operations before mentioned being deducted from the said rent, the damages and values of ground so added or taken away being ascertained by arbitration, as after provided, but it shall not be competent to the tenant to make any claim for damages alleged to have been done in any year of this lease whereof the rent has been paid and unconditionally discharged; and declaring that no damages shall be due to the tenant for any sand pits or quarries to be opened or roads made to the same for the purpose of improving the farm hereby let with respect to building, fences, roads, or drains; and reserving also all plantations, trees, and plantation pastures on the said farm, and also ^{Plantations.} free access to and from the same, for the purpose of inspecting, pruning, dressing, cultivating or cutting down, selling or rousing and carrying away any part of the trees on the said farm or in the neighbouring plantations, or in the hedges and marches, and planting others in their places, without any compensation being payable to the tenant therefor; and reserving also to the landlord full power, either by himself or those acting for him or having his authority, to visit and perambulate the said farm at all reasonable times: Reserving also all water in streams and springs rising in or traversing the lands hereby ^{Water.} let subject to the proper use thereof, or of such parts thereof as may be required, by the tenant for the purposes of the farm only; reserving also to the landlord the whole game on the lands hereby let other than ^{Game.} the ground game thereon, and, with reference to the ground game, reserving to him a concurrent right thereto, along with the tenant, in terms of the provisions of the Act 43 & 44 Vict. c. 47, and reserving full power also to the landlord and those having his permission to shoot, hunt, course, and sport over the said lands, and to see that the game and ground game are not improperly destroyed; and also reserving to the landlord the fish in the waters on the said lands, with the exclusive liberty by himself or others having his permission of fishing for the same: Which tack, with and under the conditions, reser- ^{Warrandice.} vations, provisions, restrictions and declarations, before and after written,

Rent.

the said A binds and obliges himself, and his heirs and successors to warrant to the said _____ and his foresaids at all hands: For which causes, and on the other part, the tenant binds and obliges himself, his heirs, executors, and successors whomsoever to content and pay to the landlord, or to his commissioner or factor, and that at any place he or they may appoint, the sum of _____ sterling, of yearly rent for each crop, and that at two terms of the year, Martinmas and Whitsunday, by equal portions, beginning the first half-year's payment thereof at the term of Martinmas, eighteen hundred and _____ and the second at the term of Whitsunday following, and that in full for the crop and year eighteen hundred and _____,

Insurance.

and so forth half-yearly and termly during this lease: But declaring, that if the landlord shall see fit, he shall have full power to exact payment of the rent of each crop at the legal terms of Whitsunday and Martinmas in the year in which it is sown: And further declaring that the rent of the last crop shall be paid in full, or caution to the satisfaction of the landlord or his factor for the payment thereof shall be found, at the term of Martinmas in that year, and before the removal of any part of the crop and stocking from the ground: As also, to pay along with the rent at Martinmas, yearly, one-half of the premium on a policy or policies of insurance against fire already effected or to be effected by the landlord in name of himself and his successors on the houses and buildings on the said farm, the amount of said insurance being their full value, as the same shall be determined by the landlord or his factor: And further, the tenant shall insure in his own name with a respectable insurance company to be approved of by the landlord, and shall exhibit at the term of Martinmas yearly receipts for the premium on a policy of insurance on the crop and stocking on the said farm to the amount of not less than one year's rent, and, failing his doing so, the landlord may insure the said crop and stocking at the tenant's expense: And, in the event of accident by fire, the landlord shall have the power of settling with the insurance company or companies and receiving for himself the compensation for any damage that may have been sustained by the buildings, and the amount received for damage done to the crop or stocking shall be applied towards extinction of the rents due or current at the time, and the balance, if any, shall be paid to the tenant; with a fifth part more of each termly payment of the said rent and premiums of insurance of penalty in case of failure, and interest at the rate of five per cent. per annum during the not payment: And, further, the tenant binds himself to relieve the landlord of all claims by the outgoing tenant for work and manure given by him to any summer fallow-ground, including the unexhausted value of whatever lime may have been purchased and laid thereon by the outgoing tenant during the last two years of his lease, and also for the grass or herbage seeds sown in the last year, if furnished by the outgoing tenant, and also the value of the dung or manure made after sowing the last crop and left upon the farm, and to pay the landlord the price of the grass or herbage seeds sown in the last year, if the same shall have been furnished by him: Further, the tenant binds and obliges himself to reside personally upon the farm, and to have and keep continually a sufficient stocking of every kind thereon, which shall be *bonâ fide* his own property, and to labour and manure the lands in a proper husbandmanlike manner, so as not to run out or deteriorate the same; and

Residence.

particularly, without prejudice to the forgoing generality, to follow and observe the rotation and mode of cropping after specified, viz. :

Rotation.

From which course of cropping the tenant shall not deviate without the written consent of the landlord or his factor: And further, the tenant shall not, without the consent in writing of the landlord or his factor, sell or send off from the farm any of the crops which may be grown thereon, but shall consume the whole thereof upon the farm, excepting corn, including wheat, barley, oats, pease, and beans, in a thrashed state, and potatoes, or hay of the first year raised from sown grass seeds, and wheat straw, but subject to the provision hereinafter mentioned, and in the last year, as in the other years of this lease, the tenant shall be bound to adhere to the rotation of cropping above

Grass seeds.

prescribed, and accordingly to sow down with a proper assortment of grass and clover seeds the portion of the lands falling to be sown down that year, unless the landlord shall have given him three weeks' notice of his desire to sow in such grass and clover seeds himself, and which he shall have power to sow in, not only with the prescribed portion of white crops, but with any other white crops on the farm he may see fit, without compensation; and in either of these cases the tenant shall, without charge, properly harrow, roll, and cover in the seeds, and shall afterwards preserve the land so sown from being hurt or pastured by live stock of any kind; and for which grass or herbage seeds sown in the last year, if furnished by the tenant, as well as for work and manure given by him to any summer fallow-ground in the last year of the lease, if not of greater extent than the average of former years, and also the unexhausted value of whatever lime he may have purchased and laid upon the fallow-ground during the last two years hereof, the tenant shall be paid for the same by the landlord or incoming tenant, as may be fixed by arbitration, as after mentioned: And further, the tenant shall

Waygoing crop.

be bound, during the year before the last of this lease, to consume upon the farm the whole fodder grown thereon that year, and to apply the dung made therefrom in manuring the ground for the last crop, and in the option of the landlord, either to sell the last growing crop of corn and hay to the incoming tenant at a valuation to be fixed by arbitration, as after mentioned, or to consume the same upon the farm, and to leave thereon the dung or manure to be made after sowing the last crop; for which dung the tenant shall be paid by

Manure.

the landlord or the incoming tenant, as the value thereof may be fixed by arbitration, as after mentioned, or to consume the same upon the farm, and to leave thereon the dung or manure to be made after sowing the last crop; for which dung the tenant shall be paid by the landlord or the incoming tenant, as the value thereof may be fixed by arbitration, as after mentioned; and the tenant obliges himself, in the first three weeks of July yearly, to cut

Weeds.

down all thistles, dock, ragwort, and other weeds of every description growing on the farm, and, if he neglects so to do, the landlord shall have power to do it at the tenant's expense; and it is hereby provided and declared that if the tenant shall depart from the regulations before specified as to the treatment and management of the land, he and his foresaids in that case hereby became bound to pay yearly the sum of ten pounds of additional rent for each acre treated or cropped differently from the mode before mentioned, and which

additional rent, as the same shall be ascertained by arbitration, shall not be considered penal but as pactional, and shall be payable to the landlord, at the same terms, with the original rent, and with the like interest and penalty as stipulated in case of failure in payment thereof, without prejudice, nevertheless, to the landlord's right to put a stop to irregular cropping or mismanagement :

Heather. And further, where there is any heather, heath, or moss on the farm, the tenant binds and obliges himself not to burn the same except with the permission, in writing, of the landlord, or those acting for him, and under the direction of the landlord's gamekeeper, or any other person to be appointed by the landlord : And further, the tenant shall defray the expenses of all carriages necessary for repairs or additions to the houses, embankments, drains, and fences, or for any new houses, embankments, drains, and fences which may be erected or formed during the lease, and where young hedges may be planted upon the lands he shall also defray the expense of making or putting up any railing or paling necessary for defending the same, and of preparing a compost of earth and dung or lime to be laid on the thorn beds before the thorns are planted, provided the ground shall appear to the landlord, or those acting for him, to require such manure, the landlord always furnishing wood for such paling, the tenant paying for cutting, carrying, and setting it up ; and the landlord, at his own option, shall either furnish the necessary quicksets for the hedges or repay the tenant the prime cost of the same upon his procuring them himself : And further,

Buildings, fences, &c. the tenant accepts the buildings, fences, hedges, gates, roads, water runs, ditches, drains, mill-dams, sluices, water lades and trows, lead pipes, stop-cocks, pumps, and watering places on the farm, as sufficient for the farm and in good and tenantable condition, and which buildings and others now built and made, or hereafter to be built and made, as aforesaid, the tenant binds and obliges himself and his foresaids to keep in good tenantable condition during the currency of this lease, and to leave in like condition at the expiry thereof : And the tenant shall be bound to paint once in every four years, with one coat of good oil paint, the whole outside wood and iron work of all the buildings on the farm ;

Hedges. but the landlord reserves power, if he sees fit, to cut, prune, and keep all the hedges on the farm by his own labourers or others, and charge the tenant with one-half of the expense thereof, which shall be payable six months after the work has been performed ; and, in case the tenant shall at any time or times neglect to keep the houses and others in proper order, then the landlord, or those acting for him, shall be at liberty to cause the necessary repairs to be made, and to charge the expense thereof to the tenant, who shall be bound to pay the same along with his next term's rent, but which obligation on the tenant as to fences shall not be held to apply to any fences round any plantations on the lands, which last the landlord shall maintain at his own expense, the tenant being bound, however, as aforesaid, to defray the expenses of all carriages necessary for the upkeep of the said plantation fences : And the tenant binds and obliges himself and his foresaids to preserve, so far as in his power, all woods and plantations presently on or that may be on the premises from all damage during the currency of this lease, and to give information against persons who may be found injuring them : And the tenant shall not be entitled to keep any dogs

other than collie dogs required for sheep, and he shall give information against all poachers and trespassers: And further, if the tenant shall execute any improvements on the lands specified in the first or second parts of the schedule annexed to 'The Agricultural Holdings (Scotland) Act, 1883,' he shall be bound on the completion of such improvements, or when required by the landlord, to furnish a detailed statement giving particulars of the cost of such improvements, and shall, along with the said statement, be bound to produce vouchers as far as practicable therefor for the inspection of the landlord, and the tenant shall be bound to produce for the inspection of the landlord at any time, and from time to time, all accounts incurred by him in connection with improvements specified in the third part of the schedule to the said Act, and, if required, analyses of all manures and feeding stuffs not produced on the holding referred to in said accounts, but nothing herein contained shall be held as authorising the tenant to make any of the improvements specified in the schedule annexed to the said Act, nor shall the production of any statement, voucher, analysis, or other document, or any demand by the landlord therefor, as before provided, be held as a consent or acquiescence by the landlord in any outlay to which such documents may apply: And further, in the event of any dispute arising between the landlord and the tenant under this lease, whether hereinbefore specially referred to arbitration or not, the same is hereby referred to the final sentence and decree arbitral of two neutral persons to be mutually chosen as arbiters, or, in the event of their differing in opinion, of an oversman to be named by them, and the decision of such arbiters or oversman shall be final and binding on the parties, and it shall be lawful for either party, when such difference shall arise, to call upon the other immediately to name an arbiter on his part, and in the event of either party failing to concur with the other in the nomination of arbiters within six days after being called on to name an arbiter as aforesaid, it shall be lawful for the sheriff of the county or his substitute, on the application of either party, to name an arbiter for the party so failing, and the arbiters so appointed shall, in the event of their differing in opinion, appoint an oversman, and the award of such arbiters or oversman so appointed shall have the same force and efficacy as if both parties had concurred in the nomination; and both parties bind themselves to fulfil the award of the arbiters or oversman so appointed in the same way as they have already bound themselves to fulfil the award of persons mutually chosen as aforesaid: And it is hereby provided and declared that if the tenant shall at any time during the currency of this lease become bankrupt, or if his estate and effects shall be sequestrated in terms of any Act of Parliament in force at the time, or if he shall voluntarily divest himself of his property by trust-disposition or otherwise for behoof of his creditors, or shall fail to reside personally on the farm hereby let, then, and in any of these events, it shall be in the power of the landlord to put an end to this tack, and to resume possession of the subjects hereby let without any declarator or process of law to that effect, either at the first term of Whitsunday or the first term of Martinmas thereafter as he may see fit: And, in the event of the death of the tenant, leaving an arrear exceeding one half-year's rent, it shall not be in the power of the heir or successor to take up the lease, except with the consent of the landlord, but the same shall, in the landlord's option, come to an end at the first

Removing.

term of Martinmas thereafter : And it is hereby stipulated that, in the event of this lease being in consequence of the bankruptcy or insolvency of the tenant, or his voluntary divestiture, brought to a termination before the natural issue, then the whole straw of the crop and the whole dung on the farm, in the year when the lease is so terminated, and also all the grass on the farm, and also all the grass and clover seeds sown with the crop of that year, shall become the property of the landlord, who shall be entitled thereto without payment : And further, the tenant binds and obliges himself to give the incoming tenant possession of the ground to be under crop the following year and the new-sown grass, on the separation of the last crop from the ground, and also the use of as much of the houses and barnyard as may be necessary for enabling his servants and horses to plough the land, and his horses and cattle to consume any part of the crop he may have acquired from the outgoing tenant, in manner before mentioned, during the last half-year of this lease, and to flit and remove himself and his family, servants, goods, and effects furth and from the lands and others hereby let at the expiry of this lease without any warning or process of removing ; and failing their doing so, then the tenant binds and obliges himself and his foresaids to pay the yearly rent of pounds sterling for each year he or they shall possess after the expiry hereof without a new agreement in writing, and at that rate for any shorter period, and that not as a penal, but as a pactional rent, and that without prejudice to the right of the landlord to insist in a summary removal or ejection in course of law : And both parties bind and oblige themselves and their foresaids to implement and perform their parts of the premises to each other under the penalty of pounds sterling, to be paid by the party failing to the party observing or willing to observe the same over and above performance : And they consent to the registration hereof and of the decree or decrees arbitral to be pronounced in virtue of the provisions herein contained, for preservation and execution.—In witness whereof these presents written, in so far as not printed, on this and the preceding pages.

No. XV.

LEASE OF FARM IN VIEW OF AGRICULTURAL HOLDINGS ACT.

Landlord.
Tenant.

IT is contracted and agreed between A, heritable proprietor of the lands and others hereinafter let, on the one part, and on the other part, in manner following :—That is to say, the said A, in consideration of the rent or tack-duties and other prestations after written, and under the reservations, conditions, provisions, and declarations after expressed, hereby lets to the said and heirs, excluding heirs-portioners (the eldest heir-female, when the succession would devolve by law on heirs-portioners, succeeding without division), and also excluding subtenants and assignees, legal or voluntary, and creditors, or managers for creditors, in any way or shape, unless

with the consent of the proprietor of the lands hereby let, but with power to the tenant to destine this lease, by will, to any member of his family, or to his widow, subject to the approval of the proprietor, to be expressed in writing under his hand: Provided always that he shall provide the legatee with the necessary means of stocking the farm, if the legatee has not adequate means for that purpose: Declaring that this arrangement shall supersede the provisions of the Agricultural Holdings (Scotland) Act, 1883, as to the bequest of the lease, which are hereby dispensed with by mutual consent: Declaring that the said A, the proprietor of the subjects hereby let, and his successors, are hereinafter designated 'the landlord,' and that the said _____, or the person in right of this lease for the time, is hereinafter designated 'the tenant,'—All and whole the farm of _____ lying in the parish Possession. of _____, and county of _____, and that for the period Endurance. of _____ years from and after the term of Whitsunday eighteen Entry. hundred and _____ as to the houses, grass, and fallow, and to the land under white crop, at the separation of that year's crop from the ground, which is hereby declared to _____ the term of the tenant's entry to the premises under this lease, notwithstanding the date of these presents: Reserving always to the landlord the whole coal, lime, marle, Reservations. stone, clay, slate, sand, or gravel, and all other minerals, metals, and fossils in the said farm, and all the sea-ware and shell-sand which may be found on the estates, with full power and liberty to him, by himself or his tacksmen or servants, or others having his authority to search for, work, win, manufacture, and carry away the same, and to make all pits, mines, quarries, roads, railways, aqueducts, buildings, and works necessary therefor, and for the working, storing, and carriage of minerals from adjoining and neighbouring lands and estates, and to carry said minerals under or over the lands hereby let, on payment of surface damages to be ascertained in manner after mentioned: And also reserving to the landlord power to spread, dry, and burn into kelp the whole of the said sea-ware, without being liable in any damages therefor: As also reserving power to the landlord to resume any part or parts of the said farm, not exceeding _____ acres imperial measure in whole, he being at the expense of making and upholding fences around all ground so resumed, that may be planted or otherwise appropriated so as to render a fence necessary, and allowing to the tenant an abatement from the rent, to be fixed, in the event of difference, by arbiters, in manner after provided; and also reserving to the proprietor power to take off or resume any portion of the unimproved land and moss at pleasure without any payment therefor: As also to straighten or alter marches, and excamb ground with any neighbouring proprietor or tenant; and to make, alter, use, or close up roads upon the said farm, the value of any ground that may be added to the said farm by excambions, or alterations of marches, being added to the rent hereinafter stipulated, and the value of any ground that may be taken off the said farm, or damaged by any of the operations before mentioned, being deducted from the said rent, the damages and value of ground so added or taken away being ascertained by arbitration as after provided; but the tenant shall not be allowed any damages or reduction of rent for materials taken off the farm in making or repairing roads: And it shall not be competent to the tenant to make any claim for damages alleged to have been done in any year of this lease

whereof the rent has been paid, and unconditionally discharged : Reserving also to the landlord all trees, woods, and plantations, grass therein, and fences surrounding the same, with access thereto at all times, and right to use them at pleasure, as well as to prune, cut, and remove them, and to plant others in their place, or in the hedges and marches, without any compensation therefor : Reserving also all water in streams or springs rising in or traversing the lands hereby let, subject to the proper use thereof by the tenant for the purposes of the farm only : And also, so far as not inconsistent with the Ground Game Act, 1880, reserving the rabbits, hares, and other game on the said lands, and the fish in the rivers and streams, and in the sea, with the exclusive privilege of hunting, fowling, and fishing on the same by himself, or by others having his authority ; the tenant being hereby bound to protect the plantations and fences, and also the game on the lands, and to warn off intruders : Reserving also to the landlord all the mosses on the estates, with full power to improve and cultivate the same, and to dispose of and let such portions thereof as he may think proper : Which

Warrandice. tack, with and under the conditions, reservations, provisions, restrictions, and declarations before and after written, the said A binds and obliges himself and his successors to warrant at all hands : for which causes, and on the other part, the tenant binds and obliges himself, his heirs, executors, and successors whomsoever, to pay to the landlord, and his successors or representatives, or to his or their assignees, or to the proprietor of the said lands and others hereby let for the time, or to his or their factor for the time being, at _____, or such other place

Rent. as they may appoint, the sum of _____ sterling in name of yearly rents and that half-yearly during the currency hereof, in equal portions,

Terms of payment. at Whitsunday and Martinmas after entry, beginning the first term's payment at the term of Whitsunday eighteen hundred and _____, and the next at the term of Martinmas following, in full of the first year's rent under this lease, and so forth half-yearly and termly during this lease : Declaring that the whole of the rent of the last year and crop under this lease shall be payable at the term of Whitsunday in that year before any part of the crop or stock has been removed from the ground : As also, to pay, along with the

Fire insurance. rent, at Whitsunday yearly, one-half of the premiums on a policy or policies of insurance against fire to be effected in name of the landlord and his successors, on the full value—as the same may be determined by the landlord or his factor—of the houses, mills, and other buildings on the said farm ; and further, the tenant shall insure, in his own name, with a respectable Insurance Company to be approved of by the landlord, and shall exhibit at the said term of Whitsunday yearly receipts for the premiums on a policy of insurance on the crop and stocking on the said farm to an amount of not less than one year's rent, the whole premium on the last-mentioned policy being paid by the tenant himself, and failing his doing so, the landlord may insure the said crop and stocking at the tenant's expense ; with a fifth part more of each termly payment of the said rent and premiums of insurance of penalty, in case of failure, and interest thereon at the rate of five per centum per annum during the not-payment : As also, to perform his share of carriages of all materials necessary for rebuilding or repairing the church and churchyard dyke, manse, and offices, and minister's garden-walls in the said parish, or, in the option of the landlord, to pay a

Repairing churches, &c.

proportion of the expense of performing the same corresponding to the rent of the farm hereby let : Further, the tenant binds and obliges himself to reside personally upon the farm, and to have and keep continually a sufficient stocking of every kind thereon, which shall be *bond fide* his own property, and to labour and manure the lands in a proper husbandmanlike manner, so as not to run out or deteriorate the same; and particularly, without prejudice to the foregoing generality, to follow and observe the rotation and mode of cropping after specified, viz. :—The farm is to be divided into five divisions, as nearly equal as may be consistent with the best manner of subdividing and enclosing the same; and each division, upon being broken up from grass, shall be the first year in oats; the second year fallow, or drilled turnips, or potatoes, properly dunged and dressed (not more than one-third being in potatoes); the third year wheat, barley, or oats, sown down with a sufficient quantity of grass and clover seeds, and the next two years in grass : Or, a six-course shift may be followed, in which case the farm is to be divided into six divisions, and each division, upon being broken up from grass, shall be the first year in oats; the second year fallow, or drilled turnips, or potatoes, properly dunged and dressed (not more than one-third being in potatoes); the third year wheat, barley, or oats, sown down with a sufficient quantity of grass and clover seeds, and the next three years in grass; declaring that, whether under the five or the six-course shift, the grass shall be cut only once in each rotation, and shall be pastured in the other year or years; and the tenant having selected either of these courses, each division shall be laboured, manured, and cropped accordingly each year successively during this lease, unless any modification or alteration shall be specially sanctioned in writing by the landlord, or by those acting for him; but declaring that the tenant may allow the land to lie in grass for a longer period than three years, but in that event he shall be bound to put the whole farm into proper rotation, prior to the termination of his lease, by breaking up a fair proportion in each year, and failing his doing so, he shall leave the extra land in pasture without payment therefor : And further, the tenant shall cut down, at least twice every year, all rag-weeds, docks, thistles, and all other weeds on the farm, once before they come into flower, and again before the first of September : And further, the tenant binds and obliges himself to consume the whole fodder and turnips upon the said farm, and to apply thereto the whole manure made therefrom yearly, and not to sell or carry off any manure or article capable of producing manure, excepting only potatoes and hay, the tenant purchasing and applying to the farm an equivalent value of manure : As also in the last year of this lease, to allow the landlord, or incoming tenant, to sow grass seeds in such divisions of the farm as fall to be sown out in the year of the tenant's removal, and the tenant shall harrow and roll in the seeds without payment, and protect the young grass from being pastured by cattle or sheep, or otherwise injured, and pasture the rest of the grass during the last year of the lease with only the average quantity of stock kept on the farm during the previous years of this lease : Provided always that the grass seeds shall be sown within five lawful days after written notice given by the tenant to the landlord or incoming tenant that the ground is ready for being sown : And the tenant binds and obliges himself, in the last year of the lease, to give the land intended for green crop one ploughing before the winter

Residence and
stocking.

Cropping.

Cutting
weeds.

Manure.

Grass seeds.

Waygoing
crop.

Last year's
ploughing.

Payment by
incoming
tenant.

Penalty for
miscropping.

Improve-
ments.

preceding the expiry of the lease, for the use of the incoming tenant, who shall have right to enter on and work the said land after the same has been ploughed, and, at latest, on the fifteenth day of April; and the incoming tenant shall have right of access to the garden ground on the first day of March preceding the expiry of this lease for the purpose of working and cropping the same: And further, the tenant obliges himself to make over to the landlord or incoming tenant the whole manure on the farm made after the last green crop under this lease shall have been sown, for which manure, and for first year's grass, and for the ploughing of the land intended for green crop, the landlord or incoming tenant shall pay according to the valuation of arbiters mutually chosen, as after mentioned; but declaring that if a seven or eight course shift shall be arranged between the proprietor and outgoing tenant, the incoming tenant shall also have access at the Whitsunday term to all other grass; but the waygoing tenant shall, in addition to the payment he is to receive for first year's grass sown out with the preceding year's crop, be entitled to payment of the value of second, third, and fourth year's sown grasses at such value as shall be ascertained by arbiters or an oversman to be appointed as after mentioned, and such payment for the value of second, third, and fourth year's grasses shall be in full of compensation to the waygoing tenant for all improvements specified in the third schedule of 'The Agricultural Holdings (Scotland) Act, 1883:' And further, on receiving intimation on or before the first day of July in the last year of this lease, the tenant shall be obliged to leave, and the landlord or incoming tenant shall be bound to take, the whole or one-half of the waygoing grain crop, at the fiars' prices of the county of for that crop—the quantity and quality of the grain and the value of the fodder to be ascertained within fourteen days before the same is ready for harvesting, by arbiters, or an oversman to be appointed as after mentioned—one-half of the value, as nearly as may be, and as the arbiters or oversman shall fix, to be paid at Martinmas after reaping, and the remainder when the fiars of the crop shall have been struck; but declaring that the expense of harvesting the crop, if done by the landlord or incoming tenant, as the same shall be fixed by the arbiters or oversman, shall be deducted from the sum to be paid to the tenant, and the incoming tenant shall, previous to taking possession, pay the price thereof, or give satisfactory security therefor if required; all the straw remaining unconsumed on the farm (except the straw of the last crop under the lease) shall become the property of the landlord, without any allowance for the same, and the landlord or incoming tenant shall be entitled to any bushes, trees, and flowers in the garden, which the tenant may be legally entitled to remove, at a valuation not exceeding, in any case, three pounds sterling: And further, it is hereby declared, that if the said farm shall be cropped or managed in a manner contrary to the before-written regulations, or any of them, the tenant shall pay ten pounds sterling of additional rent, along with the rent hereinbefore stipulated, for every acre so cropped in the year or years in which the deviation from the prescribed course of management shall take place, and that not as a penalty, but as additional rent, which shall be recoverable in the same way as the foresaid rent of the farm, without prejudice nevertheless to the landlord's right to put a stop to irregular cropping or mismanagement: And further, the tenant binds and obliges himself, whenever the landlord shall expend money on buildings,

drainage, or other improvements or repairs, to perform the carriage of materials free of charge, the cost of all such carriages being in all cases excluded from the valuations, and in the case of buildings, to take out the foundations also free of charge, and to pay half-yearly, along with his rent, interest on the outlay on buildings and other improvements, except drainage, at the rate of five per centum per annum: And it is hereby specially agreed with reference to the Agricultural Holdings (Scotland) Act, 1883, that during the currency of this lease a sum not exceeding may be expended in drainage on the lands Drainage. hereby let, and no more; and on any sum so expended by the landlord, the tenant hereby binds and obliges himself and his foresaids to pay interest at the rate of five per centum per annum half-yearly, such interest to run from the date or dates at which such expenditure shall have been made; and for the purpose of ascertaining the amount of such interest, a statement under the hand of the landlord or his factor, showing the amount due, shall be sufficient; and it is specially provided and agreed to that the interest shall be deemed and dealt with as part of the rent, and shall be recoverable as rent in the same manner as if the amount thereof had been added to the rent of above specified; and it is hereby agreed that notices in terms of section 4 of said Act are hereby dispensed with, and declared to be of no force or avail between the parties hereto, this arrangement being substituted for compensation for improvements specified in Part II. of the schedule appended to said Act: And it is Buildings. agreed that when buildings are to be erected by the tenant at his own cost, the plan of said buildings shall, previous to their being commenced, be approved of, in writing, by the landlord or factor: And further, the tenant shall be bound to keep the houses and steadings now on the farm, and also any additions which shall be made thereto during the lease, constantly in good repair, and to paint with two coats of best Repairs. oil paint the external doors and windows once at least every five years; failing in which, the landlord may order all needful repairs and painting, and charge the expenses of the same to the tenant; and the tenant having received the houses, fences, roads, ditches, Unkeep of houses and fences. and drains on the said farm in sufficient tenantable condition, binds and obliges himself and his foresaids to uphold the whole houses, roads, bridges, dykes, fences, ditches, and drains, made or to be made, on the said farm, in good and sufficient tenantable condition during this lease, and to leave them in the like condition at the expiry thereof: and particularly to uphold the dykes, made or to be made, on the said farm, in a sufficient fencible state during this lease, and to leave them at the expiry thereof slap free, and with the coping on, and to keep the said drains and ditches, made or to be made, properly scoured during this lease, and to leave them at the expiry thereof in good order; and in case the tenant shall fail to keep the said houses, roads, bridges, dykes, fences, ditches, and drains, or any of them, in good repair and order, as aforesaid, it shall be lawful for the landlord to execute the necessary repairs thereon at the expense of the tenant; and the tenant binds and obliges himself to pay the landlord such sum as he may disburse for putting the said houses, roads, bridges, dykes, fences, ditches, and drains, or any of them in good order, as the same shall be ascertained by the receipts of the tradesmen employed by him or his commissioners or factors to do the

Outgoing tenant's claim.

Compensation clause.

Arbitration clause.

Irritancies.

work : And further, the tenant shall be bound to relieve the landlord of all claims which may be competent to the outgoing tenant under the Agricultural Holdings (Scotland) Act, 1883 : And further, in the event of the land being farmed on the five or sixth course shift, and the whole land left in regular rotation, it is hereby agreed, with reference to the said Agricultural Holdings (Scotland) Act, 1883, that the compensation, if any, payable to the tenant at the termination of this lease, in respect of improvements specified in Part III. of the schedule appended to the said Act shall not exceed the rates and proportions of unexhausted value specified in the schedule annexed and signed by the parties as relative hereto, and which shall form the basis of and regulate the award to be issued in the arbitration, if any, which may follow in terms of the Act, and it is hereby declared that the compensation thus fixed on the basis of this schedule shall be deemed to be substituted for compensation under the Act ; but the tenant shall be bound nevertheless to give the landlord the notice required by section seven of the Act should he determine to claim compensation : And the tenant hereby binds and obliges himself and his foresaids not to use, or at any rate not to claim for having used, a greater quantity of purchased manures and feeding stuffs on the said farm in the last year of this lease than the average quantity thereof used during each of the two preceding years : Provided always that, in fixing the amount of compensation payable to the tenant, the arbiters and oversman shall be entitled to make such deductions as they think fit, if in their opinion the manurial value of the substances used has been reduced through the fault or negligence of the tenant, or if through his fault or negligence the land is in such a state of cultivation as to prevent the substances having their proper beneficial effect on the soil : And further, in the event of any dispute or difference arising between the landlord and tenant under this lease, whether hereinbefore specially referred to arbitration or not, the same is hereby referred to the final sentence and decree-arbital of two neutral persons to be mutually chosen as arbiters, or, in the event of their differing in opinion, of an oversman to be named by them, and the decision of such arbiters or oversman shall be final and binding on the parties ; and it shall be lawful for either party, when such difference shall arise, to call upon the other immediately to name an arbiter on his part ; and in the event of either party failing to concur with the other in the nomination of arbiters within six days after being called on to name an arbiter as aforesaid, it shall be lawful for the sheriff of the county, or the Judge Ordinary of the district for the time, on the application of either party, to name two persons as arbiters, who shall have power to appoint an oversman, and the award of such arbiters or oversman so appointed shall have the same force and efficacy as if both parties had concurred in the nomination ; and the award of the parties or party so appointed shall be final and binding on the landlord and tenant, and fulfilled in the same way as the award of persons mutually chosen as aforesaid : And it is hereby provided and declared that if the tenant shall, at any time during the currency of this lease, become bankrupt, or if his estate and effects shall be sequestered in terms of any Act of Parliament in force at the time, or if he shall voluntarily divest himself of his property, by trust-disposition or otherwise, for behoof of his creditors, or shall allow one half-year's rent to remain unpaid when the next half-year's rent shall have become due, or shall fail to reside

personally on the farm hereby let, or admit lodgers, except of his own family, or shall keep any tavern or public-house on the premises hereby let, or permit others to do so, then, and in any of these events, it shall be in the power of the landlord to put an end to this tack, and to resume possession of the subjects hereby let, without any declarator or process of law for that effect; and in the event of the death of the tenant leaving an arrear exceeding one half-year's rent, it shall not be in the power of the heir or successor to take up the lease, except with the consent of the landlord, but the same shall, in the landlord's option, come to an end at the first term of Whitsunday thereafter; and it is hereby stipulated, that in the event of this lease being, in consequence of the bankruptcy or insolvency of the tenant, or his voluntary divestiture, brought to a termination before the natural issue, then the whole straw of the crop, and the whole dung on the farm in the year when the lease is so terminated, and also all the grass on the farm, whether of the first or any year, shall become the property of the landlord, who shall be entitled thereto without payment: And further, the tenant binds and obliges himself Removal. to flit and remove himself and his family, servants, goods, and effects, furth and from the lands and others hereby let at the expiry of this lease, without any warning or process of removing; and failing his doing so, then the tenant binds and obliges himself to pay the yearly rent of pounds sterling for each year he shall possess after the expiry hereof without a new agreement in writing, and at that rate for any shorter period, and that not as a penal but as a pactional rent, and without prejudice to the right of the landlord to insist in a summary removal or ejection in course of law: And the landlord and Penalty. tenant bind and oblige themselves and their foresaids to implement and perform their respective parts of the premises to each other, under the penalty of pounds sterling, to be paid by the party failing to the party observing, or willing to observe the same, over and above performance; and they consent to the registration hereof, and of any decree-arbitral to be pronounced in virtue of the provisions herein contained, for preservation and execution. — In Testing-clause. witness whereof, these presents, consisting of this and the preceding pages, are subscribed by the parties hereto as follows, *videlicet* :—

SCHEDULE REFERRED TO IN THE FOREGOING LEASE.

1. *Lime applied to the land.*

Six-tenths of cost after first crop; five-tenths after second crop; four-tenths after third crop; three-tenths after fourth crop; two-tenths after fifth cost; and one-tenth after sixth crop. Exhausted in seven years.

2. *Crushed bones and bone meal.*

Half of cost after first crop, and one-fourth of cost after second crop. Exhausted in three years.

3. *Dissolved bones, bone phosphates, guano, and police manure.*

One fourth of cost after first crop. Exhausted in two years.

4. *Other artificial manures.*

Exhausted by first crop; no compensation.

5. *Feeding stuffs.*

For linseed, cotton, and rape cakes, or for other purchased substances of equal manurial value, consumed on the holding by cattle and sheep during the last year of the lease, one-third of the value thereof.

¹ Vouchers in all cases to be produced, and also an analysis by a competent analytical chemist, if required. The arbiters and oversman may take such other evidence as they may think necessary.

² No allowance to be made for carting lime, manure, or feeding stuffs, or for applying the lime or manure to the land.

No. XVI.

LEASE OF A SHOP.¹

Parties.

IT is contracted, agreed, and ended by and between Mrs. A B or C, residing at _____, widow of the deceased Thomas C, merchant in _____, as sole accepting tutrix of A C, her son, proprietor of the subjects and others after mentioned, conform to deed of nomination by the said deceased Thomas C in favour of her, and of certain other parties who declined to accept, dated the _____ day of _____ in the year _____, and recorded at _____ upon the _____ day of _____, on

Letting.

the one and first part, and D, E, F, and G, all merchants in _____ and carrying on business there as merchants, under the firm of H & Company, on the other and second part: That is to say, the said first party, as tutrix foresaid, has set, and subject to the conditions, provisions, and declarations after mentioned, and in consideration of the tack-duty and other prestations after specified, she hereby sets, and in tack and assedation lets to the said D, E, F, and G, and the survivors and survivor of them, in trust for behoof of their said firm of H & Company, and partners thereof, present and future, according to their respective rights and interestst herein, All and whole the warehouse and shop belonging in property to the said A C, situated upon the south side of I Street of I, and entering by No. _____ of that street, together with the

Subject let.

counters, shelving, fittings, and whole other fixtures of the said warehouse and shop belonging to the said A C, conform to inventory thereof endorsed hereon, and signed as relative hereto, all as presently possessed by the said second parties, and that for the space of ten years from and after the term of Whitsunday in the year 18 _____, which is hereby declared to have been the term of entry of the said second parties to the premises in virtue hereof; but subject always to this express condition, that as before the expiry of the said period of ten years the said A C will have attained fourteen years of age, and my tutory will then have expired, it shall be in his power on attaining that age, either to confirm this lease for the remainder of the said period of ten years, in which case it shall subsist and continue, or to repudiate this lease, in which case it shall terminate at the term of Whitsunday next ensuing his attaining the said age of fourteen years: In the peaceable possession of which subjects the said first party, as tutrix foresaid, hereby binds and obliges the said A C to maintain and defend the said second parties until he shall attain

Duration.

Entry.

¹ Taken from 2 Hunter, 614.

the said age of fourteen years : But providing and declaring always, as it is hereby expressly provided and declared, that the said second parties shall not be at liberty, without the previous consent in writing of the said A C, or his heirs or assignees, to assign this lease or any part thereof, or to subset the premises hereby let, or any part thereof ; or in case of the second parties taking other premises during the currency of this lease, to leave the premises hereby let, or any part thereof, vacant, or to use the premises hereby let for any other purpose than that for which they are at present used, or to deposit any goods or merchandise therein of a more hazardous kind than those presently placed therein, so as to affect the insurance of the subjects against fire ; and in the event of the said second parties contravening all or any of the said prohibitions, not only shall they be liable to the said A C or his foresaids for all loss and damage he or they may thereby sustain, but over and above exacting the said loss and damage the said A C and his foresaids shall be entitled, if he or they see fit, forthwith upon such contravention to put an end to this lease : For which causes, and on the other part, the said D, E, F, and G hereby bind and oblige their said company of H & Company, and themselves as partners thereof and as individuals, and their respective heirs, executors, and representatives whomsoever, all conjunctly and severally renouncing the benefit of discussion, to content and pay to the said A C and his heirs and assignees the sum of £ sterling of yearly rent or tack-duty for the said subjects hereby let, and that half-yearly at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first payment at the term of Martinmas next in the year 18 for the half-year immediately preceding, and the next payment thereof at Whitsunday thereafter, and so forth half-yearly and termly thereafter during the continuance of the lease, with a fifth part more of each term's payment of liquidate penalty in case of failure in the punctual payment thereof, and the legal interest of each term's payment from the time the same becomes payable during its non-payment : And further, the said second parties hereby accept of the premises as in good tenantable repair, and bind and oblige themselves to keep them during the currency of this lease, and to leave them at the termination thereof, in the like good tenantable repair, ordinary tear and wear only excepted : And it is hereby expressly provided and declared that the said second parties shall have no right to make any alterations or improvements on the premises hereby let without the previous consent in writing of the said A C or his foresaids, and that any such alterations or improvements, as well as any ordinary repairs which the said second parties may make, shall be done at their own expense, and at the sight and to the satisfaction of K, architect in , whom failing, of any other architect to be named by the said A C or his foresaids, such architect being hereby specially empowered to see to the due execution thereof : And further, the said second parties hereby bind and oblige themselves to remove themselves, their servants, and dependants, goods and gear, furth and from the whole premises hereby let at the expiration of the foresaid period of ten years, or at the earlier termination of this lease, as aforesaid, and to leave the same void and redd, to the end and intent that the said A C or his foresaids may then enter thereto, and peaceably possess and enjoy or let the same at pleasure, and that without any warning or process of removal for that effect ; and in the event of the second parties failing so

Assigment
and sublease
excluded.

Inversion, &c.

Rent.

Maintenance.

Alterations,
&c.

Removal.

Additional
rent.

to remove, they shall be bound, and hereby bind and oblige themselves, to pay to the said A C or his foresaids the sum of £ sterling of yearly rent for each and every year or part of a year they shall continue so to possess the said subjects after the expiry of the said period of ten years, or the earlier termination of this lease, as aforesaid, with interest and penalty corresponding thereto, as aforesaid, but without prejudice to the said A C or his foresaids enforcing the second parties' removal by summons of removing and ejection, or other legal proceedings: And lastly, the said first party binds and obliges the said A C and his foresaids, and the second parties bind and oblige themselves, to implement and fulfil their respective parts of the premises to each other, under the penalty of £ , to be paid by the party failing to the party observing or willing to observe the same, over and above performance. And they consent to the registration, &c.

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